No. 3753

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DOUGLAS FIR EXPLOITATION & EXPORT COMPANY (a corporation),

Plaintiff in Error,

vs.

W. LESLIE COMYN and BENJAMIN F. MACKALL, co-partners doing business under the firm name of COMYN, MACKALL & COMPANY,

Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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PERNAU-WALSH PRINTING CO.

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Statement of the Case.

This controversy is in this court on Writ of Error from the Southern Division of the District Court of the United States for the Northern District of California, Second Division.

The action is one for damages for alleged partial breach of contract and was tried jury waived. Defendants in error, who were the plaintiffs in the court below, had judgment against the plaintiff in error (defendant in the court below) for the sum of $17,592.72 (Record, page 58). Throughout this discussion we

will refer to the parties as they were ranged in the trial court.

The contract alleged to have been breached by the defendant, the Douglas Fir Exploitation and Export Company, is set up in the complaint as being found in two documents, accepted and approved by the plaintiffs, shows an agreement to purchase four cargoes of fir lumber for four exporting vessels.

It was initiated by a letter dated November 2, 1916, from defendant to plaintiffs, which is correctly shown at pages 68 and 69 of the Record as "Plaintiffs' Exhibit No. 1". The other document, mentioned in the complaint as establishing the completed contract, was an *"Acknowledgment of Order"*, so called, from the defendant, dated December 8, 1916 (plaintiffs' Exhibit No. 4, pages 82, 83 of Record). This "Acknowledgment of Order" is alleged to have been sent to the plaintiffs by the defendant on December 15, 1916, with the request that plaintiffs sign their acceptance of same, which was done on December 28, 1916.

These two documents alone forming the contract sued on, show (*inter alia*) the sale of a cargo for the schooner "W. H. Marston" of 1,300,000 feet of fir 15% more or less to suit the capacity of that vessel, with delivery and shipment to be made at Knappton, Washington, between October 1 and December 31, 1917. Further allegations of the complaint show that the plaintiffs in November 1917 prepared to take delivery of this fir by having barges and stevedores present at Knappton, but that defendant failed and refused to deliver the same.

The complaint was demurred to on the ground (*inter alia*) (a) that the presence of the schooner "W. H. Marston" at Knappton was a condition precedent to any delivery by defendant and the complaint did not show a compliance with said condition precedent; (b) that the complaint did not show that the schooner "W. H. Marston" was present at any time to take delivery of the lumber (Demurrer, Record pages 9-12). This point, thus early raised in the case is the meat of the controversy,—the schooner "W. H. Marston" was unable to and failed to make her agreed loading date and plaintiffs claim the right to take delivery of the lumber on barges instead of the named exporting vessel.

Defendant's demurrer to the complaint was overruled by Judge Van Fleet (Record pages 13, 14), and thereafter defendant filed its answer alleging, *inter alia,* that plaintiffs' written approval of the contract, initiated by defendant's letter of November 2, 1916, was delivered to defendant enclosed in a letter dated November 6, 1916 (defendant's Exhibit F, Record page 157), in which plaintiffs asked permission to substitute another exporting vessel for the "W. H. Marston" if they should find it convenient in the future to do so; and that this requested modification of the tentative contract was refused in an answering letter dated November 8, 1916 (defendant's Exhibit G, Record page 158). Defendant's answer further alleged that the contract was carried out, in part, by a delivery of a cargo to the schooner "W. H. Talbot", within her delivery date, and by a delivery of a cargo to the schooner

"Golden Shore", within her delivery date (this latter being one of the two exporting vessels subsequently named by plaintiffs as the receiving medium for part of the lumber), and that the reason said contract was not carried out as to the cargoes for the schooner "W. H. Marston" and the schooner "Wm. Borden" (this latter being the other vessel which was subsequently named by the plaintiffs), was that neither of these vessels were present at their agreed loading ports any time between October 1 and December 31, 1917.

After alleging other material matters, the answer, in conclusion, sets up five separately numbered defenses (Record pages 26-37). To this answer *plaintiffs* filed a demurrer and a motion to strike (Record pages 43-50).

Judge Van Fleet in an oral decision (Record pages 51, 52), denied in toto the motion to strike and sustained the demurrer only as it was directed to the concluding five separately numbered defenses. The case then went to trial before *Judge Bean,* jury waived, after which that court made its findings of fact and conclusions of law (Record page 53), and filed its memorandum opinion (Record page 59) upon which a final judgment was given for $17,592.72 in favor of plaintiffs with costs (Record page 58). Thereafter defendant filed its petition for a new trial (Record page 61), which was denied and this writ of error was then sued out and perfected (Record pages 320-328).

DEFENDANT'S CONTENTIONS UNDER ITS ASSIGNMENT OF ERRORS.

It is not the intention of the defendant (plaintiff in error) to urge upon the court all of the assignments of error shown in the record because we believe it will be unnecessary as those which we shall urge are sufficient in themselves to require a reversal of the judgment which is the subject of this writ of error. The contentions which we make are as follows:

First Contention.

We contend that the court erred in overruling defendant's demurrer to plaintiffs' complaint. Furthermore, Judge Van Fleet's ruling on plaintiffs' demurrer to the defendant's answer and motion to strike, clearly showed that the court took a changed view of the case after the answer had been filed, amounting nearly to a reversal of the ruling on the demurrer to the complaint, and it was reversible error for the trial court to follow the ruling of Judge Van Fleet on the demurrer to the complaint. That it was reversible error for the trial court to recognize plaintiffs' contract with the Charles Nelson Co., a contract with which defendant had nothing to do, and to link consideration of the latter with the contract in suit. (Assignment of errors Nos. I, VIII, X, XII, XXI, XXVI, XXVIII.)

Second Contention.

We contend that the trial court erred in sustaining plaintiffs' demurrer to the separate defenses set up in articles I, II, III, IV and V of the answer, and at the trial in refusing to allow proof to be made of those de-

fenses. The principal of those defenses being shown by the allegations of Article I to the effect that at the time the sale in question was made, it was known to the plaintiffs that defendant corporation was organized for the purpose of making sales of Douglas fir lumber for immediate exportation to foreign countries; that it had no power to sell said fir and make delivery of the same in such way as to give the buyer the discretion to export it, and that all the terms and conditions set up in the instant contract, bearing on the "W. H. Marston's" cargo, were known to be intended as safeguards and guarantees that said fir would pass from defendant's into plaintiffs' possession in such manner as to make it imperative that the same be exported and that plaintiffs should be denied the power or right of dealing with it in any other way. That if a delivery of said fir could possibly be made to a barge or barges, such a delivery would place it within plaintiffs' legal right and power to dispose of it as they might see fit and in such manner as to make the sale a violation of defendant's charter and of the laws of the United States. (Assignment of errors, III, XV, 9th ground, XVII, XIX, 9th ground.)

Third Contention.

The cases on the subject of sales made "f.o.b." and "f.a.s." In the light of the facts of the case at bar, there can be no distinction made in the meaning of these two trade terms, as used in the instant contract. (Assignment of errors, VIII, X, XIX, XX, XXVI.)

Fourth Contention.

We contend that the court erred in not holding that the sale in question was of a *cargo* to suit the capacity of the "W. H. Marston," estimated to be 1300 M feet, 15% more or less, and also erred in holding that the sale was for 1300 M feet without reference to the "W. H. Marston" as a receiving medium, and that delivery of said 1300 M feet of lumber could have been taken on barges or anything else besides the vessel. (Assignment of errors Nos. VI, XXVII, XIX, 7th ground.)

Fifth Contention.

The time of delivery. We contend that the time of the cargo's delivery is fixed by the time of the actual arrival of the "W. H. Marston" at the loading dock, between October 1 and December 31, 1917. (Assignment of errors Nos. XV and XIX, grounds 8th and 12th, and XXVIII.)

Sixth Contention.

The place of delivery. We contend that the naming of the "W. H. Marston", also conditioned the place of the delivery of the lumber, in that it was such place at the Knappton mill wharf at which defendant could exercise its option of making delivery "f.o.b." mill wharf Knappton, within reach of vessel's tackle and/or on barges "a.s.t." mill wharf Knappton. (Assignment of errors, XV and XIX, 8th and 12th grounds, and XXVIII.)

Seventh Contention.

The quantity of lumber sold. We contend that the testimony is all to the effect that in cargo sales to suit

the capacity of a named vessel, it is impossible to know the exact amount of such sales until the vessel is actually loaded. (Assignment of errors Nos. VIII, XV, and XIX, 1st, 2nd, 3rd and 4th grounds.)

Eighth Contention.

The benefits accruing to defendant through the naming of the "W. H. Marston" as the receiving medium for the lumber.

Ninth Contention.

We contend lastly that it was error for the trial court to refuse to deduct 15% from the final judgment of $17,592.72, thereby making such judgment the minimum in amount. (Assignment of errors No. IX.)

Argument.

FIRST CONTENTION.

WE CONTEND THAT THE COURT ERRED IN OVERRULING DEFENDANT'S DEMURRER TO PLAINTIFFS' COMPLAINT. FURTHERMORE JUDGE VAN FLEET'S RULING ON PLAINTIFFS' DEMURRER TO DEFENDANT'S ANSWER AND MOTION TO STRIKE, CLEARLY SHOWED THAT THE COURT TOOK A CHANGED VIEW OF THE CASE AFTER THE ANSWER HAD BEEN FILED, AMOUNTING NEARLY TO A REVERSAL OF THE RULING ON THE DEMURRER TO THE COMPLAINT, AND IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO FOLLOW THE RULING OF JUDGE VAN FLEET ON THE DEMURRER TO THE COMPLAINT; THAT IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO RECOGNIZE PLAINTIFFS' CONTRACT WITH THE CHARLES NELSON CO., A CONTRACT WITH WHICH DEFENDANT HAD NOTHING TO DO, AND TO LINK CONSIDERATION OF THE LATTER WITH THE CONTRACT IN SUIT. (ASSIGNMENT OF ERRORS NOS. I, VIII, X, XII, XXI, XXVI AND XXVIII.)

In the court's memorandum opinion (Record, page 59), it is said that the single question for decision "is whether the failure of plaintiff to have the "Marston" at the mill wharf ready to receive cargo within the delivery dates specified in the contract relieved the defendant from the obligation to make delivery as demanded",—namely, on barges, "in other words, whether the plaintiff could legally require delivery without furnishing the named vessel as the receiving medium."

Defendant's demurrer to the complaint touching the absence of an allegation showing the presence of the "W. H. Marston" at the Knappton mill dock, ready to receive cargo, was fully argued and briefed in the lower

court and the demurrer was overruled by Judge Van Fleet. Upon the filing of defendant's answer, its defensive allegations touching the "W. H. Marston's" absence from the mill dock, was demurred to by plaintiffs, fully argued and briefed and also overruled by Judge Van Fleet. The contradictory situation thus brought about by these two decisions on the pleadings is of significance in view of the fact that, in the said memorandum opinion, Judge Bean expressly relies upon and follows the law and ruling announced in Judge Van Fleet's decision on the demurrer to the complaint, when he says:

> *"This question in substance was decided by Judge Van Fleet adversely to defendant on demurrer to the complaint. In his opinion I fully concur."*

In view of the fact that this decision of Judge Van Fleet's overruling the demurrer to the complaint is also referred to by the District Court of Appeal of California in *Meyer v. Sullivan,* 40 Cal. App. 723, it is appropriate that this court should be fully advised of defendant's contention that both these courts have erred in following Judge Van Fleet at this demurrer stage of the pleadings, for the reason that when defendant's answer was filed and there was set up the fuller facts of the case; Judge Van Fleet, in effect, reversed his first opinion by allowing defendant to allege in its answer, *as a defense,* the failure of plaintiffs to have the "W. H. Marston" present to take delivery of the lumber sold as her cargo. That this court may see clearly the importance placed by Judge Van Fleet on the new and fuller allegations of defendant's answer; we herewith

cite some of them which plaintiffs' demurrer and motion to strike unsuccessfully attacked:

Plaintiff's motion to strike the following allegations of the answer was denied.

> "Furthermore defendant alleges, that the use of the phrase 'f.a.s. mill wharves', in the instrument referred to in said paragraph III, was understood by both plaintiffs and defendant to require the actual presence, at a mill wharf, to be designated by defendant, of a sailing vessel to receive at her tackles, delivery of the cargo of fir agreed to be sold." (Answer, Record page 16.)
>
> * * *
>
> "That said 'G' List is a standard schedule solely of prices of Douglas fir lumber, bargained for or sold to be exported only, and that said 'G' list furnishes the basis for the quotation of prices for Douglas fir for export shipment only, to be delivered only to vessels at lumber mills within reach of such vessel's tackles, and defendant alleges that at all times mentioned, in said complaint, said 'G' List was so known and understood by both plaintiffs and defendant." (Id. 17.)
>
> * * *
>
> "Defendant further alleges that among the terms and conditions of said 'G' List which were understood and accepted by both plaintiffs and defendant as forming a part of the contract sued on herein, is one providing that the prices in said 'G' List are based on delivery of the fir by the seller to sailing vessels, and defendant alleges that the prices in the contract sued on were based solely on delivery of a cargo of fir to the sailing vessel "W. H. Marston", and that this was at all times the understanding and agreement of both plaintiffs and defendant." (Id. 18.)
>
> * * *
>
> "—and that it in fact did, in accordance with said contract, deliver to the schooner 'W. H. Talbot',

at her tackles, at a designated mill wharf, the full cargo of 'fir' called for in said contract; that in accordance with said contract it delivered to the schooner 'Golden Shore', at her tackles, at a designated mill wharf (she being one of the vessels which, as required by said contract, plaintiffs subsequently named), the full cargo of 'fir' called for in said contract; that although plaintiffs named, as required by said contract, the schooner 'Wm. Borden' as the fourth vessel, the cargo of 'fir' contracted for that vessel was not delivered by defendant at her tackles, or at all, because of the failure of plaintiffs to have the said 'Wm. Borden' at the agreed loading berth at the agreed date, and defendant alleges that the contract in so far as it applied to both the schooners 'W. H. Talbot' and 'Golden Shore' was fulfilled in strict accord with its terms, while that portion of said contract which applied to the schooners 'W. H. Marston' and 'Wm. Borden' was cancelled by defendant for the same reason, namely: the failure of plaintiffs to have either of said last named vessels at the designated loading place within the agreed and specified loading time." (Id. 24.)

* * *

Plaintiffs not only moved to strike but also demurred to the following allegation of the answer and their motion to strike was *denied* and their demurrer *overruled.*

"And defendant alleges in this connection that it was never understood or agreed by plaintiffs or defendant at the time said contract was entered into, or at any other time, that a barge or barges might, at the option of plaintiffs, be furnished and used by plaintiffs in taking delivery of said fir intended for and sold as a cargo to the said schooner 'W. H. Marston', but on the contrary it was the understanding and agreement of the parties and so expressed in said contract, that the option was

> given to defendant to make delivery of said cargo at the tackles of the said 'W. H. Marston' from either the mill wharf or from barges alongside, or from both said mill wharf and barges, and that this privilege and provision of the contract was inserted wholly for the benefit of defendant." (Id. 22, 23.)

Plaintiffs also *demurred* to the following allegation of defendant's answer and their demurrer was *overruled.*

> "Defendant as a further separate answer and defense to this action alleges that the said schooner 'W. H. Marston' was never at the mill wharf of the Knappton Mills and Lumber Company, at said Knappton, Washington, at any time within the period extending from the 1st day of October to the 31st day of December, 1917, inclusive, and as a consequence it was never within the power of defendant and/or the said Knappton Mills and Lumber Company to deliver to said vessel a cargo of 'fir' on the mill wharf of said Company, free alongside said vessel, or free on board said mill wharf within reach of said vessel's tackles, or on barges at said vessel's tackles at said mill wharf." (Id. 24, 25.)

Furthermore, it cannot be denied that Judge Van Fleet in rendering his oral decision (which appears not to have been preserved), on plaintiffs' attack on defendant's five separately pleaded defenses, commencing at page 26 of the Record, denied the motion to strike and granted the demurrer with the statement, in effect, that these five separately pleaded defenses were statements of evidentiary matter properly subject to proof but improperly pleaded.

From Judge Van Fleet's view of these allegations of the answer above quoted (and there are others of equal

significance which we have not referred to), it should be clear that after defendant's answer had been filed; the court's view of its defense which required the actual presence of the "Marston" to receive the lumber intended as her cargo,—had *completely changed* since passing on the demurrer to the complaint, and had Judge Bean properly concurred with Judge Van Fleet, he would have followed him in his later and more enlightened view of the question, and this would have made it impossible to hold that he had decided the question "adversely to defendant".

There can be no fitter place than here to briefly discuss the case cited by Judge Bean in support of the above finding and a case which was greatly relied upon by plaintiffs at the trial.

Meyer v. Sullivan, 40 Cal. App. 723; 731, 732.

As may have been inferred, the interesting thing about this California case is that it too cites Judge Van Fleet's ruling on defendant's demurrer to the complaint in the case at bar, but it says nothing about the same court's ruling on *plaintiffs'* demurrer to the answer and motion to strike, for the obvious reason that *Meyer v. Sullivan was* decided April 19, 1919, and it was not until nearly three months thereafter, July 14th, that Judge Van Fleet rendered his decision on plaintiffs' demurrer and motion to strike. Had *Meyer v. Sullivan* been decided *after* Judge Van Fleet's second decision, something more and different would have to be said about the case at bar. Furthermore, it cannot be denied by counsel that, while Judge Van Fleet had under consideration plaintiffs' attack on defendant's

answer in the case at bar, he was *specifically and fully* advised, that his ruling on the demurrer to the complaint had been "followed" in *Meyer v. Sullivan.* The reason *Meyer v. Sullivan* was not followed by Judge Van Fleet is that its bearing on the facts of the case at bar, *as amplified by defendant's answer,* is nil. This we can easily show.

The contract in the Sullivan case was to deliver a certain quantity of wheat at *"$1.43⅓ per 100 lbs. f.o.b. Kosmos steamer Seattle".* The court expressly held that in such an agreement the term "f.o.b." was not connected with the place of delivery but was used in connection with the price only and did not, therefore, require the presence of the steamer. The opinion must be read with this fact in mind, for if the term "f.o.b. Kosmos steamer Seattle", as a matter of construction, was used with reference to the price only and not as fixing the exact place of delivery; then, obviously, the presence of the ship could have been waived by the buyer.

Moreover, there is a marked distinction between a contract calling for a cargo to suit the capacity of a named vessel,—a capacity cargo, and one which calls for simply a certain quantity of goods measured in hundreds of pounds. Furthermore, it is perfectly clear that the court in *Meyer v. Sullivan had no idea* that the particular provision which it quotes from the instant contract; *"Delivery f.o.b. mill wharf, Knappton, within reach of vessel's tackles and/or on barges a.s.t. (at ship's tackles), mill wharf, Knappton, Wash.",* was an optional mode of making delivery reserved by the

seller (plaintiff's Ex. No. 5, Record page 85; Baxter Record page 228). Had this been understood, it is not difficult to see that it would have raised the question in the court's mind of whether or no, an option, given to the seller, of alternative methods of making a delivery of a cargo, can be overridden or destroyed by the buyer without the seller's consent.

In conclusion, therefore, of this phase of the discussion, we hope that we have made clear to the court, that (a) there was error in Judge Bean's memorandum opinion as well as in the opinion in *Meyer v. Sullivan,* based, *as both were,* on the early, if not premature, ruling of Judge Van Fleet on the demurrer to the complaint, which ruling Judge Van Fleet found it necessary later to reverse after the fuller facts of the case were revealed by defendant's answer.

While it doubtless would be a cause of satisfaction to have this court find error in the overruling of defendant's demurrer to the complaint (assignment of errors No. I), nevertheless, there must be a discussion of the whole case and it would, therefore, be unprofitable to divide too conclusively the argument into periods before and after the filing of defendant's answer. This latter pleading placed before the court not only the *completed* contract but also the relevant and material facts bearing upon its proper construction, and a discussion of the law of the case, governing the incomplete allegations of the complaint would be idle, if it is to be followed by a discussion of all the law and material facts revealed by both complaint and answer.

Not only did Judge Bean have before him the allegations of the complaint and answer, but he went farther and based his decision on *a prior contract* which was not pleaded and with which the defendant had nothing to do.

In its consideration of the instant contract, the trial court has stepped outside the pleadings and has improperly linked to its consideration of the instant contract a prior cancelled contract between other parties, covering a different subject matter and embodying different terms. Having done this, it finds that the instant contract was *"confirmatory of and by reason of"* such prior cancelled contract, and that in this latter *"no receiving vessel was named"* (Findings of Fact and Conclusions of Law, I, Record page 53).

There is no need for uncertainty as to the identity of the contract. The complaint itself says it was entered into "in manner as follows: defendant wrote to plaintiffs a letter as follows, to wit:

> " 'San Francisco, Cal., November 2, 1916.
> Messrs. Comyn, Mackall & Co.,
> 310 California St.,
> City.
> Gentlemen: *Sold prior to October 11, 1916.*
> This will confirm sale to you of four cargoes Fir f.a.s. mill wharves as follows:
> "W. H. Marston" 1300 M October to December 1917
> "W. H. Talbot" 1000 M October to December 1917
> (Quotations subject to change without notice. All agreements are contingent upon the acts of God, riots, strikes, lock-outs, fires, floods, acci-

dents, inability to secure cars, transportation or other causes of delay beyond our control.)
and two of your own vessels to be named later, with a combined capacity of 1450 M, both for loading October to December 1917, cargo to be furnished f.a.s. vessel at loading ports at 60 M daily in Puget Sound, Columbia or Willamette Rivers, Gray's Harbor and Willapa at our option, but one loading port only for each vessel, loading port to be named by us in ample time to give vessel instructions before leaving her next previous port of call.

Tally and inspection by Pacific Lumber Inspection Bureau at loading port. Certificate to be furnished and to be final. Price $9.50 base "G" list less 2½%, 2½% cash. Marking if required, distinguishing mark at 10¢ per M. extra cost.

Written in duplicate. Please approve and return one copy.

Very truly yours,
Douglas Fir Exploitation & Export Co.,
By A. A. Baxter,
General Manager.' "

It is then alleged that plaintiffs endorsed on one copy of this letter their written approval and delivered said endorsed copy to defendant.

It is then alleged:

"On December 15, 1916, defendant notified plaintiffs that it would deliver the 1,300,000 feet of 'Fir' specified in said contract as a cargo for the 'W. H. Marston' at the mill wharf of the Knappton Mill & Lumber Company, at Knappton, Washington, which said wharf is situated on the Columbia River. On said 15th day of December, 1916, defendant sent plaintiffs an instrument entitled 'Acknowledgement of Order', in words and figures as follows, to wit:

ACKNOWLEDGMENT OF ORDER.

Douglas Fir Exploitation & Export Co.,
260 California St.,
San Francisco, Cal.

Date December 8, 1916.

Our No. 38 page 1.

Knappton Mills & Lumber Company.

Your Order No..... Dated.....

Sold to Comyn, Mackall & Company.

For account of

to be delivered at Knappton, Wash.

For reshipment to

Time of shipment October to December, 1917.

Time of delivery ditto.

Mill Tally and inspection to govern and to be final. Agreements are contingent upon the acts of God, strikes, lock-outs, fires, floods, accidents, inability to secure cars, transportation or other causes beyond our control. This is a confirmation of your order as we understand it. Please check each item with your original order and advise us promptly of any errors. Read carefully the special notes in our price list. Shipment will be made as per this confirmation irrespective of original order unless advised to the contrary by you.

SCH. 'W. H. MARSTON'

1,300,000 feet B. M. 15% more or less to suit capacity of vessel.

Price: $9.50 Base 'G' List, Less 2½% & 2½% for cash.

Destination: Australia (usual Australian specifications)

Grade: As per 'G' List, P. L. I. B. Certificate to be furnished.

Delivery: 60 M feet per working day or pay demurrage as provided by Charter Party.

Marking: Marking if ordered, 10 cents per M, net cash.

Shipment: October to December, 1917.

Terms and conditions: As per 'G' List.

> Notes: This price is for delivery f.o.b. mill wharf, Knappton, within reach of vessel's tackles and/or on barges a.s.t. mill wharf, Knappton, Wash.'
> and defendant on said 15th day of December, 1916, requested plaintiffs to sign their acceptance of said order, and thereupon plaintiffs signed their acceptance of said order and forthwith forward said signed acceptance of said order to defendant.'' (Record, pages 3-6.)

Defendant's answer admits the writing of the letter of November 2, 1916, admits its approval and delivery of the copy to defendant but further alleges that such approved copy was delivered enclosed in a letter from plaintiffs dated *November 6, 1916* (Answer, Article III, Record, pages 14, 15).

The answer further admits that there was sent to plaintiffs the instrument set forth in Article IV of the complaint, entitled ''Acknowledgement of Order'' and then alleges that this instrument was sent to plaintiffs enclosed in a letter dated December 15, 1916 informing plaintiffs that the order for the lumber for the cargo for the schooner ''W. H. Marston'' had been placed with the Knappton Mills and Lumber Company and requesting plaintiffs to sign the accepted copy of this order and return the same to defendant and that this was done. (Id. page 15.)

At the trial the letter of November 6, 1916, in which plaintiffs enclosed defendant's letter of November 2nd, was introduced together with defendant's answering letter of November 8th and these two letters, we submit, are links in the correspondence that went finally to

make the completed contract. These letters read as follows:

"November Sixth, 1916.

Douglas Fir Exploitation & Export Co.,
260 California Street,
San Francisco, California.

Dear Sirs:

We have to acknowledge receipt of your sale note covering 3500 M' 15% more or less October to December, 1917. We now take pleasure in approving same as per enclosed. It is understood that the vessels named in your sale note are not to load above the bridges on the Columbia River, and with regard to the balance of the purchase, it is understood that the same cannot, under any circumstances, be shipped from the Portland Lumber Company. We have also very great prejudice against shipping from the Inman Poulsen, Clark & Wilson and Peninsula Mills, and would much appreciate your not stemming us with those mills. We presume also that you would have no objection if it was found convenient, to our substituting other vessels in place of the 'Marston' or the 'Talbot'.

Very truly yours,
Comyn, Mackall & Co.,
Per Claude Daly."

(Defendant's Ex. "F" Record, page 157.)

"November 8, 1916.

Messrs. Comyn, Mackall & Co.,
310 California St.,
San Francisco, California.

Gentlemen:

We acknowledge yours of the 6th and confirm your understanding that none of these vessels will be required to load above the bridges at Portland which, in itself, would exclude the Portland Lumber Company; but we will also agree that none of them are to load at the mill at Portland.

The other mills mentioned by you—Inman Poulsen, Clark & Wilson and Peninsula Lumber Company—are not interested in our company, but if they should later come into the company, Inman Poulsen would still be excluded on account of being above the bridges. This then would leave only Clark & Wilson and the Peninsula Mills as possibilities and we would prefer to keep them in that position, as it might be very necessary for us to load one of your vessels at one of these mills.

As regards substituting other vessels for 'Marston' and the 'Talbot'; as these vessels are now matters of record in the contract, we would prefer not to have any agreement giving you the option of naming other vessels. If, however, you have now or will have at any future time other vessels in like position and for your convenience wish to substitute them for either one or both of these vessels, we will be pleased to go into the matter with you with a view of meeting your necessities.

Very truly yours,
Douglas Fir Exploitation & Export Co.,
By.....General Manager."

(Defendant's Ex. "G", Record page 158.)

No correspondence between the parties is shown after the letters of November 6th and 8th until defendant's letter of December 15, 1916, enclosing the "Acknowledgement of Order" dated December 8, 1916, and, therefore, in this correspondence is found the contract which the lower court was called upon to construe to determine whether or no the actual presence of the schooner "W. H. Marston" at the Knappton mill wharf was a condition precedent to a delivery of the lumber by the defendant either on the wharf at the ship's tackle or on barges at the ship's tackle.

While it may have been proper for the trial court to have permitted it to be shown what the expression found in the letter of November 2nd,—*"Sold prior to October 11, 1916"*, meant; nevertheless when such showing revealed a contract between plaintiffs and another party having nothing in common with the instant contract; the matter should have been dropped, instead of which the court's findings show that its conclusion and judgment was unquestionably based, in part at least, on a consideration of this prior cancelled contract which made no reference to a vessel as a receiving medium. The question of the right of the plaintiffs in the instant contract to waive the specifically agreed vessel as a receiving medium without the defendant's consent and to substitute therefor barges could not possibly have been affected by plaintiffs' prior cancelled contract with the Charles Nelson Company, and we submit it to be reversible error for the court to have considered it.

SECOND CONTENTION.

WE CONTEND THAT THE TRIAL COURT ERRED IN SUSTAINING PLAINTIFFS' DEMURRER TO THE SEPARATE DEFENSES SET UP IN ARTICLES I, II, III, IV, AND V OF THE ANSWER AND AT THE TRIAL, IN REFUSING TO ALLOW PROOF TO BE MADE OF THOSE DEFENSES, THE PRINCIPAL OF THESE DEFENSES BEING SHOWN BY THE ALLEGATIONS OF ARTICLE I, TO THE EFFECT THAT AT THE TIME THE SALE IN QUESTION WAS MADE, IT WAS KNOWN TO THE PLAINTIFFS THAT DEFENDANT CORPORATION WAS ORGANIZED FOR THE PURPOSE OF MAKING SALES OF DOUGLAS FIR LUMBER FOR IMMEDIATE EXPORTATION TO FOREIGN COUNTRIES; THAT IT HAD NO POWER TO SELL SAID FIR AND MAKE DELIVERY OF SAME IN SUCH WAY AS TO GIVE THE BUYER THE DISCRETION TO EXPORT IT, AND THAT ALL THE TERMS AND CONDITIONS SET UP IN THE INSTANT CONTRACT, BEARING ON THE "W. H. MARSTON'S" CARGO, WERE KNOWN TO BE INTENDED AS SAFEGUARDS AND GUARANTEES THAT SAID FIR WOULD PASS FROM DEFENDANT'S INTO PLAINTIFFS' POSSESSION IN SUCH MANNER AS TO MAKE IT IMPERATIVE THAT THE SAME BE EXPORTED AND THAT PLAINTIFFS SHOULD BE DENIED THE POWER OR RIGHT OF DEALING WITH IT IN ANY OTHER WAY. THAT IF A DELIVERY OF SAID FIR COULD POSSIBLY BE MADE TO A BARGE OR BARGES, SUCH A DELIVERY WOULD PLACE IT WITHIN PLAINTIFFS' LEGAL RIGHT AND POWER TO DISPOSE OF IT AS THEY MIGHT SEE FIT, AND IN SUCH MANNER AS TO MAKE THE SALE A VIOLATION OF DEFENDANT'S CHARTER AND OF THE LAWS OF THE UNITED STATES. (ASSIGNMENT OF ERRORS NOS. III, XV, AND XIX, 9TH GROUND.)

Originally, it was the contention of the plaintiffs that the lumber bargained for, *under the express terms of the contract,* was deliverable to the buyers on barges to be furnished by the buyers, and that its future disposition after such delivery was of no concern to the seller. This view, however, gradually changed during the progress of the trial until the contention was reached

that while it was the original intention of both parties that the lumber should be taken on board the "W. H. Marston" for export, it was immaterial to the seller *when* this was done, and that the delivery date of the contract did not necessarily apply to the time of the lumber's receipt *by the vessel* but was applicable to the time of its being placed on the mill wharf irrespective of the presence at the wharf of the "W. H. Marston". In other words, that if the buyers expressed their desire, a delivery during the agreed time, could be made for or to some other medium than the "W. H. Marston" and it would be immaterial that such receiving medium should be temporary,—immaterial that the lumber should be held on such temporary medium to await the arrival of the belated "Marston".

On the other hand, it has always been defendant's contention that the actual presence at the mill wharf of the "W. H. Marston", within the time provided by the contract, was a condition precedent to a delivery of the lumber, at that vessel's tackles, on the mill wharf, and/or on barges at the mill wharf. It has been defendant's contention that the actual presence of the "W. H. Marston" to receive delivery of the lumber sold to be exported, was a requirement of the contract affecting the subject matter of the sale, as well as the time, place and mode of its delivery, and that for each of these reasons the buyers (plaintiffs) were denied the right of waiving such requirement without the consent of the seller.

It is apparent from the correspondence, affecting the formation of the contract, that the question of substi-

tuting another *vessel* for the "W. H. Marston" as a receiving medium, was discussed and settled at the outset by the parties and that the instrument of final confirmation, being the so-called "Acknowledgement of Order", was *executed* with that question of the buyers' right of substitution clearly settled *against such right.* The request was made in the buyers' letter of November 6th, was denied in the seller's letter of November 8th, and with the matter so disposed of, the final "Acknowledgement of Order" was approved by the buyers *December 28, 1916* (plaintiffs Ex. No. 4, Record page 83). The right now claimed by the plaintiffs of substituting barges for the "W. H. Marston", or of doing away entirely with a specifically agreed receiving medium; is clearly of greater import to the defendant than was the right of substituting another vessel which was denied them, for delivery to a substitute vessel might be for export, but a delivery to a barge would carry no such inference. And, if in the signing of the "Acknowledgement of Order" there is found an acquiescence in the construction which denies the right of the plaintiffs to substitute another *vessel* for the "W. H. Marston" without defendant's consent,—certainly such an agreed construction should be conclusive of the claim of a right to substitute a *barge,* without the defendant's consent.

Let us, however, pass for the moment this question of the early construction placed upon the contract by the parties themselves and look at the matter from another view point. Was the "W. H. Marston", and were all the matters and things necessarily connected

with this exporting medium, placed in the contract *for the sole benefit of the plaintiffs* and, therefore, matters and things which plaintiffs could expunge from the contract *without the defendant's consent?*

In order to know what these things were and to determine their importance it will be in order to enumerate them so that the situation may be intelligently understood. Are the following matters necessarily connected with the "W. H. Marston" as an exporting vessel, inserted in the instant contract solely for the plaintiffs' benefit so that they may be expunged by them without the necessity of securing the seller's consent?

(1) All reference to "4 cargoes", which would leave the contract simply an agreement to sell 3,750,000 feet of lumber;

(2) All reference to "f.a.s. vessel loading ports" or "f.a.s. 'Marston', Mill Wharf,";

(3) All reference to "W. H. Marston", "W. H. Tablot", and two other vessels belonging to the buyers to be named later;

(4) All reference to the estimated carrying capacity of these respective vessels, to wit: 1,300,000 feet, 1,000,000 feet, 1,450,000 feet;

(5) All reference to separate "loading ports" for each of the four vessels;

(6) All reference to "Australia", as the destination of the "W. H. Marston";

(7) All reference to "vessel or vessels" (there are six of such references in the contract itself, not to speak

of many more found in Exhibit "A" attached to the complaint);

(8) All reference to "15% more or less to suit capacity of vessel";

(9) All reference to notice of "loading ports" being given "in time to give vessel instructions before leaving her next previous port of call";

(10) All reference to "inspection and tally" by the P. L. I. B. (Exhibit "A" attached to the complaint shows this bureau to be for the inspection of cargoes intended to be loaded on exporting vessels);

(11) All reference to any "certificate" and to its being "final"; (Exhibit "A" attached to the complaint shows this certificate to be furnished only after the "completion of the loading of the vessel");

(12) All reference to "G" list (Exhibit "A" attached to the complaint shows this list to be "a standard schedule of prices, dimensions, grading rules, etc., of Douglas Fir lumber delivered to ship at Mills for export shipment", and provides that its prices are based on delivery to sailing vessels and that unless otherwise agreed to "delivery will be made to ships * * * within reach of ship's tackles";

(13) All reference to "a daily" delivery of "60 M feet per working day"; (delivery under the changed contract would be made in solido as one concluded transaction and not continuous, day by day, at a fixed rate suiting the dexterity of the vessel in handling and loading);

(14) All reference to "demurrage" and to "charter party rate of demurrage";

(15) All reference to a delivery "a.s.t" (at ship's tackles), or "within reach of vessel's tackles" or "this price is for delivery", etc.

(16) All reference to "barges" or a delivery on barges.

The elimination of the foregoing would leave but little of the instant contract. Such omissions would so mutilate and change the instrument as to leave it no more than a mere agreement to sell 3,750,000 feet of lumber to be delivered, in solido, on the mill wharves to be designated between October and December, 1917, at the base price of $9.50 per M feet. The effect of such omissions would be to destroy the sales important export characteristics and make it the right of the buyers to take possession in any way they chose and thereafter deal with the lumber as they saw fit. The exercise of such a right would make the sale illegal and violative of defendant's charter. We submit that the documents constituting this contract show a clearly expressed purpose of providing a sure and certain guarantee by the use of the very words and terms in question, that the lumber should be put on board an *exporting* vessel for *"delivery"* and *"shipment"* to Australia between October 1 and December 31, 1917. We do not hesitate to affirm that each of the terms set forth tends to show such purpose while combined they constitute an assurance as clear as words of agreement can, that such intent would be carried out.

We pass from the enumeration of these terms and phrases, which may well be omitted if plaintiffs' construction is to be accepted, with the inquiry made by the court in another case, which seems relevant:

> "If the agreement is merely for the sale of 400 tons of paper, why were so many words employed, which the parties must once have thought possessed of meaning, and why are they now to be cast aside?"
>
> *National Pub. Co. v. International Paper Co.*, 269 Fed. Rep. 903, 905.

The allegations of the first of defendant's separate defenses commencing at page 26 of the Record, were intended to show the legal inability of defendant to enter into a contract which by its terms could be construed as a sale of lumber for any other purpose than its immediate export, or a delivery and shipment that would give the buyers the *discretionary* power to export it. The facts of this separate defense are alleged to have been known to the plaintiffs and that all the terms and conditions touching the subject of the lumber's exportation were intended as safeguards and guarantees that it would pass into the possession of plaintiffs in such manner as to make it imperative that it would be exported. A delivery to a barge would give plaintiffs the power and right to do with it as they might see fit, including the right of disposing of the lumber in such manner as to make defendant's sale a violation of its charter and of the laws of the United States.

Section 1860 of the Code of Civil Procedure of this State provides as follows:

> "The Circumstances to be Considered. For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret."

It is true that Section 1856 of the Code provides that an agreement reduced to writing is to be deemed the whole, but there is this saving clause:

> "But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in Section Eighteen Hundred and Sixty or to explain an extrinsic ambiguity * * * "

The point to be made in showing the circumstances under which the sale was made, which defendant offered to do, is not whether or no defendant was lawfully doing business but rather that plaintiffs knew that it was doing only an export business (in anticipation of the passage of a certain law) with the tacit consent of the Federal Trade Commission. Under the circumstances then would it not be logical to assume that every intendment of the parties would be against making a contract which would be violative of the law by which in its expected passage, defendant expected to be given the right to do business, or making a contract that would be violative of the defendant's charter, or making one which would tend to jeopardize its understanding with the Federal Trade Commission? All the allegations of the first separate defense of defendant's answer are solely directed to the question

of construction and in view of the facts alleged in this defense plaintiffs' construction would tend to subject defendant to a forfeiture or penalty while defendant's probably would not.

THIRD CONTENTION.

THE CASES ON THE SUBJECT OF SALES MADE "F.O.B." AND "F.A.S." IT IS OUR CONTENTION THAT IN THE LIGHT OF THE FACTS OF THE CASE AT BAR, THERE CAN BE NO DISTINCTION MADE IN THE MEANING OF THESE TWO TRADE TERMS, AS USED IN THE INSTANT CONTRACT. (ASSIGNMENT OF ERRORS NOS. VIII, X, XIX, XX, AND XXVI.)

We do not believe it will be denied by opposing counsel that heretofore in the progress of this litigation, it has been admitted by them that under the authority of what may be called the "f. o. b." cases, the actual presence of a named vessel is required, but they contend that in f. a. s. contracts, or contracts where a delivery is "a. s. t." (at ship's tackles), the buyer, without the seller's consent, may waive the requirement that the delivery be made to the named ship.

We have always failed to see the distinction thus made and submit it is not shown by the decided cases.

In *McCandlish v. Newman,* 22 Pa. St. 460, the question was as to whether there had been a delivery of hoop poles. The seller placed the poles on the wharf where they were destroyed by a freshet or flood. If placing the poles on the wharf constituted delivery to the buyer, the loss was his; if not, then the ownership remained in the seller and the loss was the seller's.

The contract itself was found in certain correspondence which contained expressions pertinent to the question of the place of delivery as follows: "Alongside vessel at Richmond"; "alongside of the vessel"; "I will have the hoops drayed to the wharf where the vessel would probably stop"; "have them (the hoop poles) all ready on some wharf". The trial judge construed the contract as requiring delivery "alongside" a vessel, and charged that the delivery on the wharf was not such a delivery and directed a verdict for the defendant.

In affirming this judgment of the District Court, the Supreme Court said:

> "It is said that delivery on the wharf is delivery 'alongside' of a vessel pursuant to the terms of the letter of October 21st; but it is not, for the vessel was not there to receive them, and without this there could be no delivery. It would rather seem that the letter of October 21st is necessary to the construction of that of the 25th. There the contract was to deliver alongside of a vessel, that is on a proper wharf, the purchasers to pay the expenses of delivery. In this view a delivery alongside of a vessel was necessary to a perfect sale in this case, and there could be no such delivery until there should be a vessel there to receive them, and there was no such delivery, and no pretense that they were ready for delivery to the vessel."

This case clearly does not permit of a distinction being made between f. o. b. and f. a. s. contracts so far as the requirement of the vessel's presence is concerned. The vessel must be there to enable a delivery to be made, either on board or alongside.

Wackerbarth v. Masson, (1812) 3 Camp. 270.

In this early English case the contract called for delivery of certain sugars *"free on board a foreign ship"*. The buyer demanded that the sugars be either weighed off and delivered to him from the warehouse, or that they be transferred into his name on the warehouse books. The seller refused to do either, but offered to put the sugars on board any ship the buyer should name. In the action for breach of contract Lord Ellenborough, in construing the contract, said:

> "The delivery for which the plaintiff undertook was on board a ship to be named by the defendant * * * Instead of naming a ship he demanded to have the sugars weighed off and delivered into his own hands, or transferred to his own name in the warehouse keeper's books. *The seller might have been exposed to some risk* or might have lost some advantage by agreeing to this, and he had a right to refuse as *it was not the mode of delivery for which he had stipulated"*.

The italicised words are peculiarly applicable to the construction of the contract in the case at bar. The seller here, as we have shown, was deeply concerned in seeing that the lumber he was selling should be actually placed on board an exporting vessel, and it ran a decided risk in deviating from the mode of delivery provided by the contract which gave to it the option of making delivery on the mill wharf within reach of the "W. H. Marston's" tackles, or on barges at that ship's tackles.

Witherell v. Coape, 3 Camp. 271.

This case was tried a few days after *Wackerbarth v. Masson* and Lord Chief Justice Mansfield and a

special jury put exactly the same construction upon a similar contract.

The principle thus early laid down by these two eminent English Commercial Jurists is the undoubted law of today and controls the construction of the contract in the case at bar, for an agreement which calls for delivery at the tackles of the named ship from the mill dock and/or from barges alongside is as certain and definite as to the place and mode of delivery as one which calls for delivery free on board a named ship.

Armitage v. Insole, (1850) 14 Q. B. 728.

In this case the contract provided that defendant should

> "give yearly free to the plaintiff during the said three years, 20 tons of coal to be put free on board ship at Cardiff for the use of the plaintiff".

In giving judgment for defendant, *on demurrer,* Patterson, J., said:

> " * * * the plaintiff must have named the ship and *should have averred* that he was ready and willing to accept the coals and that he had a ship ready to receive them."

Coleridge, J., said:

> "When circumstances left uncertain by the contract are of such a nature that one party cannot perform his part of the contract until they are fixed, the other party insisting on the contract ought to fix those particulars. Here both time and place should have been fixed by the plaintiff, but certainly place."

Wightman, J., said:

> " * * * the defendants certainly cannot give the coals free on board until they know the ship and at what port it is to discharge. Whatever therefore the construction of the agreement might be as to time, the plaintiff must fail for want of averring that he was ready and willing to name a ship."

Walton v. Black, (1879), 5 Del. 149.

The instructions given to the jury in this case were (inter alia):

> "When the vendor is to deliver a specified quantity of goods on ship board at the port of shipment within a certain period, the purchaser must first name the ship and give the vendor notice of his readiness to receive on board of her."

Dwight, et al. v. Eckert (1887), 117 Pa. St. 490.

In this case both *Armitage v. Insole and Wackerbarth v. Masson* (supra) are cited with approval and the court said:

> "It is a well established principle of the law that in a contract for sale and delivery of goods *'free on board' vessel* the seller is under no obligations to act until the buyer names the ship to which the delivery is to be made; for until he knows that, the seller could not put the goods on board."

All the foregoing cases are cited by Mechem in a note which reads:

> "When the goods are to be delivered 'free on board', the buyer's vessel, the seller is under no obligation to act until the buyer names or supplies the vessel."

Mechem on Sales, Vol. 1, Sec. 1130;

McFarland v. Savanah River Sales Co., 247 Fed. 652, (C. C. A. 3rd C.)

In this case there is made precisely the same contention as in the case at bar: If the buyer is unable to have the agreed receiving medium at the agreed place of shipment, at the agreed time, he can waive the requirement which calls for such medium's actual presence and can insist upon the seller making delivery on the wharf there to remain and to be shipped at the buyer's convenience.

The court in the McFarland case said:

> "It is clear that the parties did not expect deliveries to be made before the defendant had brought his barges to the place of delivery and shipment, for the contract specifically provided for delivery F. A. S. barge or vessel, and the payment of certain charges to the plaintiff's stevedores for loading the same. It is equally clear that the plaintiff could not make a delivery F. A. S. barge or vessel if there was no barge or vessel alongside. It is very certain that the parties did not intend that the plaintiff should pile 2,000,000 feet of lumber on its wharf, there to remain until taken away at the convenience of the defendant."

The sole distinguishing fact between the contract in the McFarland case and the contract here, on this point of delivery, is, that in the former the buyer was not restricted by the contract to limit his selection to the two barges named, while in the case at bar the buyer was limited to the use of the schooner "W. H. Marston", and delivery was to be made f. a. s. that vessel at loading port.

Maine Spinning Co. v. Sutcliffe, 23 Com. Cas. 216.

In this case, decided December, 1917, the contract called for the sale of 100,000 lbs. of Wool "delivery—Liverpool", which was construed as meaning "delivery f. o. b. Liverpool", and as the wool was bought for export (as was the lumber in the case at bar), it was further construed as requiring delivery on board an *exporting* vessel. Only 25,000 lbs. of wool were delivered and the buyer brought suit for damages for failure to deliver the balance. The question of the mode of delivery was involved and the court on that question said:

> "It being the fact, therefore, that licenses were necessary for the export of these woolen tops, and it being not now contended that the defendants did not do their best to obtain the licenses, the fact that they failed to obtain the licenses is a sufficient answer to their failure to make deliveries under this contract subject to one point upon which Mr. Schwabe relies, namely, that under the contract the buyers were entitled to take delivery at Liverpool. The contract says 'delivery Liverpool', and Mr. Schwabe says that the buyers were always ready and willing to take delivery at Liverpool, and the question whether or not they could export the goods to the United States was a matter for them and did not concern the defendants, who were bound to hand over the goods to the buyers in Liverpool. The term 'delivery Liverpool' is to some extent ambiguous, but when one considers that the wool was bought for export to the United States it is easy to come to the conclusion that 'delivery Liverpool' did not mean delivery on rail at Liverpool, but meant delivery in the way in which goods are delivered at Liverpool when they

are delivered for export at Liverpool, namely, 'delivery f. o. b. Liverpool'. If there were any ambiguity as to the meaning of the phrase 'delivery Liverpool' I am entitled to look at the cables and letters which passed between the parties at the time the arrangement was made. Apart from those cables and letters, I should have come to the conclusion that the true construction of the words 'delivery Liverpool' was 'delivery f. o. b. Liverpool'. The matter, however, is made abundantly clear when the cables and letters leading up to and immediately following the contract are looked at because they state in express terms that the contract was f. o. b. Liverpool. Mr. Schwabe, however, contends that it was open to the buyers to waive the term 'f. o. b. Liverpool' and to take delivery of the goods short of Liverpool, or at Liverpool off rail *instead of on board ship.* He says that the buyers might even have taken delivery at Bradford, the place where the goods were prepared for the fulfillment of the contract and from which place they were dispatched. In my opinion, however, that is a mistaken view of the law. It is, of course, quite true that where a term of a contract is wholly and entirely for the benefit of one of the parties to the contract it may be waived by the parties for whose sole benefit it is inserted in the contract. *But a term of the contract as to the mode of delivery is not entirely for the benefit of either party to the contract, and neither party can waive it without the consent of the other;* it is a part of the contract which has to be fulfilled by the seller making delivery at that particular place and the buyer receiving delivery there. Of course, if both parties to the contract agree to waive that term there is an end of the matter, but either party is entitled to insist upon making or receiving delivery in strict accordance with the terms of the contract."

* * * * * * *

"Mr. Le Queane has referred to the case of Wackerbarth v. Masson (2). The headnote in that case is as follows: 'Where in a contract for the sale of sugar there is the following term, "free on board a foreign ship", the seller is not bound to deliver it into the hands of the purchaser, or to transfer it into his name in the books of the warehouse where it lies, but only to put it on board a foreign ship, which it is the duty of the purchaser to name.' That is a decision of Lord Ellenborough as long ago as 1812, and it is directly in point in the present case. I was not aware of that decision, but I was quite prepared, apart from that decision, to hold, applying the rule of law laid down by Lord Watson, *that the buyers in this case were not entitled to demand delivery of this wool anywhere except on board ship at Liverpool.* That being the only point in the case there must be judgment for the defendants."

The only distinction between the Maine Spinning Company's case and the case at bar is, that there the delivery was *on board* a vessel and here *alongside* a vessel. In both cases the sale was for export and at the inception of the contract the presence of the vessel was contemplated by both parties. Hence, the absence of the vessel in both cases put an end to the contract.

See also

Nickoll v. Ashton, 2 K. B. (1901) p. 126; 2 Q. B. 1900, 298;

Forrestt & Son v. Aramayo, 9 Asp. 134, 137;

Whiting v. Gray, 27 Fla. 482; 8 So. 726; 11 L. R. A. 526;

Blossom v. Shotter, 13 N. Y. Sup. 523, Aff. 29 N. E. 145.

None of the cases we have cited compare with the case at bar in the number of indications indicative of the place of delivery requiring the actual presence of the vessel. In the instant contract the sale is of *capacity* cargoes for four *exporting vessels.* Two of these vessels were actually loaded and the contemporaneous acts of the parties (as we shall later show) clearly point to a construction of the contract in like manner when applied to the cargo for the "W. H. Marston". There is absolutely nothing to distinguish the contract as it was made to apply to the cargoes for the "W. H. Talbot" and the "Golden Shore", from its application to the cargo for the "W. H. Marston", except that this latter vessel was unable to make the delivery date agreed to by the parties.

In the "Memorandum Opinion" of the trial court three cases are cited in support of the court's conclusion that the naming of the "W. H. Marston" in the instant contract was a stipulation for the benefit of the buyers and could be waived by them. One of these cases we have already discussed (*Meyer v. Sullivan*), and the remaining two can be briefly distinguished.

Ellsworth v. Knowles, 97 Pac. 690.

This was the case of a sale of apricots wherein was found in the contract the expression: "Buyer to furnish lace paper with usual allowance for same; buyer also to furnish labels free". There was no delivery of the apricots and a minor point of controversy urged by appellants was, that plaintiff never supplied the lace paper and that this was an act that he was required

to do before defendants could pack or deliver the apricots. The court held, however, that

> "it was clearly shown that the provision, 'buyer to furnish lace paper with usual allowance for same' was a provision for his benefit. One of the defendants so testified".

It was also found that

> "while defendants were still trying to obtain the apricots to fill the contract and before they finally abandoned their efforts to carry out the contract, plaintiff notified them that they could use their own lace paper. He thus waived a provision of the contract intended for his benefit".

This is all that the case shows and therefore is woefully weak as a decision supporting the trial court's finding that the naming of the "W. H. Marston" was a provision for the benefit of the plaintiffs and could be waived by them.

Harrison v. Fortlage, 161 U. S. 64.

In this, which was the last case cited by the court, the contract was for 2500 tons of sugar *"shipping or to be shipped during this month"* (*June*) *from the Philippines to Philadelphia per steamer 'Empress of India' "*. The sugar was placed on board the "Empress of India" during the month of June and the voyage commenced. In the course of the voyage, and while at anchor at Port Said the "Empress of India" without fault, was run into by another steamer and was so much damaged as to require the landing of her cargo after which she went to Alexandria to be repaired. After being repaired her cargo was reloaded

and the vessel sailed from Port Said November 30, 1889, and in crossing the Atlantic met with extraordinary rough weather which forced her to put into Bermuda January 5, 1890 and there, upon the recommendation of surveyors and in order to proceed on her voyage with safety, she discharged 700 tons of sugar. On February 11, 1890, the "Empress of India" arrived at Philadelphia with the remaining 1800 tons. The 700 tons were forwarded from Bermuda by another steamer which arrived at Philadelphia March 3, 1890.

The tender by the plaintiffs of all the sugar was refused by defendants upon the sole ground that the contract required the sugar to be brought to Philadelphia in the "Empress of India". The case finally reached the Supreme Court on Writ of Error where the judgment of the Circuit Court was affirmed. Justice Gray in delivering the opinion of the court said that a contract *"to ship by"* a certain vessel, for a particular voyage, ordinarily means simply *"to put on board"*. Again it is said:

> "The contract nowhere requires that the sugar shall arrive in Philadelphia by the 'Empress of India' * * *" "A particular ship being designated as to the putting on board only and not as to the arrival, it is not to be inferred that the goods must be carried to their destination in the same ship."

From these brief citations it will be seen that the case cannot possibly be held an authority for holding that a named exporting medium is for the benefit of

the buyer and may be waived by him without the seller's consent.

The situation of the *non arrival* of the "Empress of India" so as to be unable to receive on board the sugar, as is the case of the "W. H. Marston," with reference to the lumber, was provided for specifically in the following provision of the contract:

> "Should the steamer through any unforeseen circumstances, such as accidents of the sea, stress of weather, etc., be unable to load these sugars within the time specified and the sellers cannot secure other steam tonnage to load in June, this contract is to be void".

The trial court's decision can, we submit, find no support in either of the three cases cited, and moreover, neither of such cases tend in the slightest to affect the principle laid down in the cases cited by us, namely: that in contracts f. o. b. or f. a. s. a named vessel, the stipulation as to the mode of delivery which requires the actual presence of the vessel, cannot be waived without the agreement of both parties.

It is further held by the lower court as a finding of fact, that the stipulation of the contract as to the "W. H. Marston" does not affect the identity of the subject of the sale, or the time or place of its delivery. "It was wholly immaterial whether plaintiffs used the 'Marston' or some other medium for the shipment of the lumber." It is also held as a conclusion of law:

> "That the failure of the plaintiff to have the 'Marston' alongside the mill wharf ready to take

> delivery of the lumber within the delivery dates did not relieve the defendant from making delivery as demanded by plaintiff",

namely: to a barge or barges. In other words, from these findings and conclusions it is shown to be the opinion of the court, that so much of the contract agreeing that the schooner "W. H. Marston" should be one of the receiving mediums for the lumber sold; was an immaterial stipulation which it was the buyers' privilege, at any time, to disregard. In this finding the court arrogates to itself the power to say whether an agreed stipulation in a mercantile contract touching the mode of delivery, is material or immaterial, of value or without value, to one of the parties making the same. In the instant contract the court arrogates to itself the right of holding as valueless and immaterial, to the seller of this lumber the stipulation of its contract requiring that the receiver of the lumber, within the agreed delivery dates, should be a certain named exporting sailing vessel, and this despite the fact that the seller offered to show that it could not legally make anything but a sale for immediate export and that this was known to the buyer when the sale was made.

We submit that the circumstances under which this contract was made were such as to make the stipulation relative to the mode of the lumber's delivery of vital importance to the seller, and of such materiality as to warrant the conclusion that without the stipulation for delivery to exporting vessels, named or agreed to be named, the contract would never have been made.

We wish now to discuss, in order, the court's finding to the effect that neither subject matter, time or place of delivery are affected by the naming of the "W. H. Marston".

FOURTH CONTENTION.

WE CONTEND THAT THE COURT ERRED IN NOT HOLDING THAT THE SALE IN QUESTION WAS OF A CARGO TO SUIT THE CAPACITY OF THE "W. H. MARSTON", ESTIMATED TO BE 1300 M FEET, 15 PER CENT MORE OR LESS, AND ALSO ERRED IN HOLDING THAT THE SALE WAS FOR 1300 M FEET WITHOUT REFERENCE TO THE "W. H. MARSTON" AS A RECEIVING MEDIUM, AND THAT DELIVERY OF SAID 1300 M FEET OF LUMBER COULD HAVE BEEN TAKEN ON BARGES, OR ANYTHING ELSE BESIDES THE VESSEL. (ASSIGNMENT OF ERRORS NOS. VI, XV, AND XIX, 7TH GROUND, AND XXVII.)

The trial court says of this matter:

> "It is claimed that the contract was for a cargo sale and that the capacity of the 'Marston' was the measure of the quantity to be delivered but the contract named the quantity, and the expression therein '15% more or less to suit capacity of vessel' would simply allow the specific quantity to be varied to that extent if the named vessel had been tendered as the receiving medium, but the failure to tender it would not relieve the defendant from making delivery if demanded of the specfic quantity".
>
> (*Memorandum Opinion, Record,* page 61).

The provisions of the contract touching this point should first be examined for it is primarily a question

of law what the subject matter is, to be determined by the contract itself.

As has been shown the first instrument making up the final contract is defendant's letter dated November 2, 1916. The provisions of this letter touching the subject matter of the sale are the following:

> "This will confirm sale to you of four *cargoes* Fir F. A. S. mill wharves as follows:
> 'W. H. Marston' 1300 M. October to December, 1917
> 'W. H. Talbot' 1000 M October to December, 1917
> and two of your own vessels to be named later, with a combined capacity of 1450 M, both for loading October to December 1917, cargo to be furnished F. A. S. vessel at loading ports at 60 M daily * * * but one loading port only for each vessel, loading port to be named by us in ample time to give vessel instructions before leaving her next previous port of call.
>
> Tally and inspection by Pacific Lumber Inspection Bureau at loading port. Certificate to be furnished and to be final * * * "

The next of the provisions bearing on the question of the subject matter of the sale are to be found in plaintiffs' letter of November 6, 1916, reading as follows:

> "We have to acknowledge receipt of your sale note covering 3500 M 15% more or less October to December 1917. We now take pleasure in approving same as per enclosed. It is understood that the vessels named in your sale note are not to load above the bridges on the Columbia River * * * * We presume also that you would have no objection if it was found convenient to our substituting other vessels in place of the 'Marston' or the 'Talbot'." (Record page 157).

It will be noted that the opening statement of this letter of acknowledging receipt "of your sale note covering *3500 M* 15% more or less", is incorrect. The aggregate of the lumber for the *four cargoes* is 3750 M. and not 3500 M, 15% more or less.

The next provision on the subject is found in defendant's answering letter of November 8, 1916, and is as follows:

> "We acknowledge yours of the 6th and confirm your understanding that none of these vessels will be required to load above the bridges at Portland * * * This then would leave only Clark & Wilson and the Peninsula Mills as possibilities, and we would prefer to keep them in that position as it might be very necessary for us to load one of your vessels at one of these mills.
>
> As regard substituting other vessels for 'Marston' and the 'Talbot'; As these vessels are now matters of record in the contract, we would prefer not to have any agreement giving you the option of naming other vessels. If, however, you have now or will have at any future time other vessels in like position and for your convenience wish to substitute them for either one or both of these vessels, we will be pleased to go into the matter with you with the view of meeting your necessities" (Id. page 158).

No immediate answer seems to have been made to this last letter but there followed a month later, the confirmatory letter of December 8, 1916, by which the contract was consummated *as to each* of the four vessels. These instruments of confirmation, so called "*Acknowledgments of Order*", were all alike in their general terms and applied to the "W. H. Marston",

"W. H. Talbot", "Golden Shore" and "Wm. Borden", the last two vessels having, since the letter of November 2, 1916, been named by the buyers in accordance with their agreement so to do found in this latter instrument. The "Acknowledgment of Order" for the "W. H. Marston's" cargo has in it, inter alia, the following:

> "This is a confirmation of your order as we understand it. Please check each item with your original order and advise us promptly of any errors. Read carefully the special notes in our price list. Shipment will be made as per this confirmation irrespective of original order unless advised to the contrary by you.
>
> Sch. 'W. H. Marston'.
>
> 1,300,000 feet B. M. 15% more or less to suit capacity of vessel.
>
> * * *
>
> Destination: Australia. (Usual Australian Specifications).
>
> Grade: As per G List, P.L.I.B. Certificate to be furnished.
>
> Delivery: 60 M feet per working day or pay demurrage as provided by Charter-party.
>
> Terms and Conditions: As per 'G' List.
>
> Notes: This price is for delivery F. O. B. Mill Wharf, Knappton, within reach of vessel's tackles and/or on barges A. S. T. Mill Wharf, Knappton, Wash."
>
> (Record pages 82, 83).

"G" list, referred to twice in this "Acknowledgment of Order", is an important part of the contract in suit (Exhibit A attached to Complaint; see Stipulation waiving printing, Record page 344), and should be carefully examined. On its face it purports to be a

price list for Douglas Fir to be furnished to *sailing vessels at their tackles.*

Other important documents referred to in this "Acknowledgment of Order", are the "Usual Australian Specifications", and in plaintiffs' letter of September 19, 1917, (plaintiffs' Exhibit No. 7, Record page 91) there was sent to the defendant not only the required specifications showing the sizes and exact quantities of the "W. H. Marston's" cargo of 1300 M feet, but pro forma bills of lading, together with the requirement for the Lumber Bureau Inspection certificate, the Marine Underwriters Surveyor's Certificate, the Master's Demurrage Release, the Stowage Plan of the ship and the Invoice of the cargo. This letter of September 19, 1917, which is in the nature of a specific demand for the documents enumerated therein, is of great importance in that it shows that at its date plaintiffs were still of the belief that the sale was of a cargo for the schooner "W. H. Marston" and nothing else. If the idea of a vessel is to be omitted from the contract in suit, then neither the letters of November 6 and 8, 1916, need have been written nor, aside from the specifications, need there have been any demand in the letter of September 19, 1917, for the other documents. Of what meaning in this transaction are bills of lading, signed by the Master of the "W. H. Marston", a "Demurrage Release", also to be signed by the vessel's Master, or the certificates of the Marine Surveyor, certifying to the proper loading of the ship, or the Stowage Plan of the ship,—if the contract is one which is to be shiplessly construed?

The *specifications* enclosed in this letter foot up the exact *estimate* of the "Marston's" capacity, 1,300,000 feet, while the pro forma bills of lading leave the number of feet of the different specification sizes blank (defendant's Ex. "E", original. See Stipulation, Record page 334). This obviously was the only thing the plaintiffs could do at this stage of the transaction, treating it as a cargo for a named vessel, for the reason that it could not possibly be known how many of such specification sizes could be loaded so as to constitute a capacity cargo for the "Marston" until the loading was actually completed, therefore, of necessity, the bills of lading were not filed in as were the specifications.

Major Griggs, of the St. Paul & Tacoma Lumber Company, in testifying of these very specifications, said:

> "Assuming that these are the specifications for a cargo to suit the capacity of a named vessel, it would be impossible before the actual loading of that vessel to know the number of the different sizes and grades that would go into that vessel" (Griggs, Record page 186).

Mr. Ames, of the Puget Mill Company, one of the largest concerns on this Coast, in speaking of the same specifications, testified:

> "Looking at the exhibit marked 'Defendant's Griggs Identification 1', purporting to be specifications, I would not know how these specifications for a cargo to suit the capacity of a named vessel could be fulfilled by loading on to barges. Of course you can put the lumber shown on these

specifications on to the barge, but you could not put it on to a barge so as to suit the capacity of a named vessel. The reason for that is that if I were going to do that I would want a definite amount. You could not put these lengths, breadths and sizes to suit the capacity of a named vessel on that barge unless you knew exactly what the ship was going to carry. I could not fill that order in proportion. It is possible to ascertain the amount a ship is going to carry only as you load her'' (Ames, Record pages 202, 203).

Plaintiffs' witness, Captain Dollar, testified on cross-examination as follows:

"The sale under a contract containing this expression, 1300 M feet, 15% more or less to suit the capacity of the named vessel, the amount of that sale, cannot be determined until after the vessel is loaded and her capacity found out'' (Dollar, Id. 283).

The plaintiff himself, on cross-examination, gives this testimony:

"Q. Here you have furnished to the seller a specification (bill of lading) with the different kinds of lumber that the order is for, but you have left blank the number of pieces, while at the same time you have sent in a specification that gives the number of pieces: now, I ask you why it was that in the specification you named the number of pieces, and in the pro forma bill of lading you left the number of pieces blank? Isn't it because you could not know until the vessel was actually loaded with this specification lumber, how many of the different pieces would have to be inserted in the bill of lading?

A. Exactly, but the mill does not have to do that; our agent can insert that in the bill of lading.

We don't have to send that bill of lading to the mill.

Q. And that is the reason, is it not, you could not tell until the vessel is actually loaded how many pieces of specification lumber would appear in the bill of lading?

A. No, not until the vessel is loaded''

(Cōmyn, Id. 161, 162).

The vessel's master could not possibly sign such bills of lading before it was known by actual loading how much lumber constituted the vessel's cargo and the number of the various specification lengths breadths and sizes that were actually loaded.

These documents all point conclusively to the fact that on September 19, 1917, the plaintiffs recognized that the sale was a cargo to suit the capacity of the ''Marston'', for they were papers demanded by the plaintiffs from defendant that could apply only to a cargo to be loaded on that vessel and could only be furnished after that vessel had been loaded to her capacity. Mr. Comyn testified as to the futility of some of these required documents, in case barges were used:

> ''If we had not supplied a vessel there, but had put barges there to take this lumber, we would not have required a bill of lading, we would have required specifications. We would have acquired the Lumber Bureau Inspection Certificate. We would not have required the Marine Underwriters Surveyor's Certificate. We would not have required the Master's demurrage release, nor a Stowage plan'' (Record p. 92).

It is also significant that when on September 20th, the day following the sending of these documents to the

defendant, plaintiffs were advised by defendant that the "Marston" was then ninety-six days out from the Columbia River bound for Melbourne, and had not yet arrived, and that "under no conditions could we commence loading this vessel later than December on the old contract", their reply to this statement, dated September 21st, was simply this: " We have no comment at the present moment to make on this matter, beyond the fact to correct your impression that the *cargo* is bought specifically for Oct/Nov/Dec." Adding irrelevantly: "*Our contract was originally* for specified quantities for July to December, and the 'Marston' was one of the boats named to apply on same." (Italics ours). It was not until nearly a week later that plaintiffs were prepared to reply to defendant's letter of September 20th. On September 27th, they wrote as follows:

> "With further reference to 1,300,000 feet B. M. fifteen per cent, more or less, to be furnished by Knappton Mills and Lumber Company for October/November/December 1917:
>
> We will take delivery of this lumber f. a. s. mill wharf Knappton and/or on barges a. s. t. mill wharf Knappton in the month of December. Please advise us promptly on what date in December you will make delivery" (Plaintiffs' Ex. No. 10, Record page 95).

In this letter several significant facts will be noted:

When the plaintiffs had on September 20th been informed that the "Marston" was then ninety-six days out from the Columbia River and had very little chance of discharging her cargo at Melbourne and returning to

the Columbia River in time to load in December, and that the defendant could not load that vessel under the $9.50 contract if she did not arrive within the agreed loading time, plaintiffs' obvious and immediate reply should have been, in effect: "we will load on barges", *if* at that time they had any idea that their contract gave them such a right. Why was it that they said: "We have *no comment* at the present moment to make on this matter"? Why didn't they have any comment to make, if they then had any idea that the "Marston's" presence was not necessary? When it is considered that plaintiffs' letter of September 27, 1917, written nearly a year after the initiation of the contract, was the first suggestion that they believed the "Marston's" presence was not necessary at the loading port within the agreed loading date,—when it is remembered that eight days before this letter of September 27th, plaintiffs had furnished defendant with specifications *for the "Marston" cargo* and had required of defendant shipping documents for that vessel's cargo—when it is further remembered that the complaint filed subsequently, on December 27, 1917, was based on a construction of the contract that gave plaintiffs the *right* to receive this lumber *on barges,* it requires no stretch of imagination to see, that between the dates of September 20 and September 27, 1917, plaintiffs had consulted counsel and had received the erroneous advice that the contract, as embodied in the provision:

> "Notes: This price is for delivery f. o. b. mill wharf, Knappton, within reach of vessel's tackles and/or on barges a. s. t. mill wharf, Knappton, Wash.",

gave to them the right to ignore the "Marston" and substitute for her barges. Barges were available, the "Marston" was not, and there was a large sum of money involved as profit.

It is instructive, also, to see how the letter of September 27, 1917, ignores the terms of the contract and with what calm assurance it attempts to change the subject-matter from a cargo to suit the capacity of the "W. H. Marston", to "1,300,000 feet B. M. 15% more or less": *"With further reference to 1,300,000 feet";* there was no such reference in defendant's letter of September 20th. It was a *cargo* for the "Marston" that letter referred to. *"15% more or less",*—there is no such abbreviated expression in the contract. The expression is, *"15% more or less to suit the capacity of the vessel".* To be furnished *"for Oct/Nov/Dec. 1917".* Plaintiffs seem to have changed their minds as to the contract's delivery dates, for in their letter of September 21st, *"Oct/Nov/Dec. 1917"* was a mistake which the letter was written to correct. "We will *take delivery* of this lumber f. a. s. mill wharf and/or on barges a. s. t. mill wharf in the month of December." (Italics ours.) There is nothing in the contract to warrant any such statement. Neither the initial letter of November 2nd, 1916, nor the "Acknowledgment of Order" of December 8th, 1916, warrants the *taking of delivery* f. a. s. mill wharf and/or on barges a. s. t. mill wharf. In the former document both of the two references to "f. a. s." are connected with a vessel. The first reference reads:

> "Four cargoes fir f. a. s. mill wharf as follows: *'W. H. Marston'* " etc.

In this reference the vessel cannot be eliminated. It is as if it read: *"f. a. s. W. H. Marston mill wharf"*. The second reference reads: *"Cargo to be furnished f. a. s. vessel."*

What is the warrant, therefore, for the statement in the letter of September 27th: *"f. a. s. mill wharf"*, when the contract can be only read: "f. a. s. vessel mill wharf or f. a. s. vessel loading port"?

In the "Acknowledgment of Order" dated December 8th the only express reference to the place of delivery is found in the option, *retained by the defendant* (*seller*), to *make* delivery f. o. b. mill wharf, *within reach of vessel's tackles* and/or on barges at ship's tackles mill wharf.

At this point we wish to call the attention of the court to two documents which make perfectly clear plaintiffs' *real knowledge* and *understanding* of the result which inevitably follows the failure of a named vessel to make her agreed loading date. When there was introduced, at the trial, the contract with the Charles Nelson Co., intended to show that that company had at one time specifically agreed in writing to load certain named vessels' cargoes on barges, if such vessels failed to make their agreed loading dates, we called for all the correspondence relating to such contract, and the following was forthcoming: First, a letter from *plaintiffs* to the Charles Nelson Co., dated *September 1, 1917*, containing the following:

> "In the event of your being prevented by strikes and/or lockouts from loading any or all of the above three vessels we to have the privilege of

substituting other vessels or barges to take delivery of the quantity of about 2,000,000 feet at $11.00 Base 'G' List, less 2½% and 2½% within 90 days after the starting up of your mills and your logging camps, you to notify us when you commence operations."

(Plaintiffs' Ex. No. 30, Record pp. 305, 306.)

There was then produced a second letter from plaintiffs, dated *September 5, 1917,* to the Charles Nelson Co., which reads as follows:

"We have to acknowledge receipt of your September 4th, T-1, in duplicate.

The same appears to us to be in order with the exception that in the event of either of the three vessels named, namely, the 'R. R. Hind', 'Encore', 'Jas. H. Bruce', not making their specified loadings, we shall have the right of taking delivery of the *cargoes* of each and all of them *by barges,* and it is on this understanding that we accept the arrangement.

You will readily understand the reasons for this. If your mill is operating at the loading dates named on the respective vessels, and any or all of them should not make the specified loading dates, *you will be at liberty to abrogate the contract,* which would work a hardship on us in view of our taking the 'Billings', 'Rosamond' and 'Espada' cargoes from you and completing same at current prices." (Italics ours.)

(Plaintiffs' Ex. No. 31, Record pp. 306, 307.)

It therefore appears that plaintiffs' letter to *defendant, of September 27,* 1917, advising of their purpose to take delivery of the cargo for the "W. H. Marston" on barges, as that vessel appeared unable to make her agreed loading date, was a bluff, and in direct opposi-

tion to what plaintiffs *knew at the time not* to be their right unless expressly given them by the contract. They had just written to another company, with whom they were negotiating for three cargoes for three named vessels, and as a reason for inducing that company to permit of the use of barges, they had informed it that unless the right, under the circumstances, was specifically given in the contract, *"you would be at liberty to abrogate the contract"* and that this abrogation of the contract under the circumstances *"would work a hardship on us"*. It is only too plain that plaintiffs in the case at bar were attempting, in the letter of September 27th and throughout all their subsequent moves, to do the very thing which they then knew they had no right to do, and the circumstances point pretty conclusively to the fact that the letter of September 27, 1917, was the result of the erroneous advice of counsel to the effect that the instant contract, *in express terms,* gave to plaintiffs the right which they claimed. The significant thing about the matter is, that on *September 5, 1917,* plaintiffs knew that they had no right to use barges in place of the "W. H. Marston", and that when defendant wrote them on September 20th saying that unless the "Marston" arrived at her loading port before the expiration of her loading period, she would lose her right to a cargo, they were told that which they already knew, and their entire conduct, subsequent to learning that the vessel could not make December loading, shows a persistent effort to secure this lumber even though their right to it was known to have been forfeited, because of the vessel's inability to reach her loading port.

From all the circumstances, we submit that from the very inception of the contract, plaintiffs knew well that the actual presence of the "W. H. Marston" at the Knappton dock was required before the end of December, or her right to a cargo would be forfeited.

Here is another matter which points to the correctness of this view. Defendant's answer alleges in effect, that plaintiffs offered defendant the sum of $2500 if the contract could be changed so as to extend the "Marston's" loading date, thereby permitting plaintiffs to take advantage of an offer from the vessel's owner of $5,000.00 for the privilege of loading, at Melbourne, a cargo instead of coming back from there in ballast as provided by her charter party, and also securing to the vessel her cargo under the instant contract.

Mr. Comyn denied at the trial having made any such offer to defendant. On the contrary, he testified that he had been told by Mr. J. Clyde Daly, his manager, that the offer of $2500 had been made to defendant by Mr. J. B. Blair of J. J. Moore & Company (Record pages 115, 116, 168, 169). Despite this denial and assertion, we believe the court will find no difficulty in finding that the offer *was made by the plaintiffs.* Mr. Baxter, defendant's general manager, so testified (Record pages 229, 230, 294, 297, 298). Mr. J. B. Blair denied that he made it to any one, either for himself or for any one else (Record pages 243, 244), and when with great reluctance we were forced to call Mr. J. Clyde Daly, plaintiffs' former manager, the following testimony was elicited:

> "In 1916 and 1917 I was employed by Comyn, Mackall & Co. in the Australian Lumber Department. I never told Mr. W. Leslie Comyn, the plaintiff in this case, that Mr. J. B. Blair, of J. J. Moore & Co., had offered the Douglas Fir Exploitation & Export Company, or Mr. Baxter, the manager of that company, $2500 or any other sum, if the Douglas Fir Exploitation & Export Company would extend the loading period of the 'W. H. Marston'. As manager of the Australian Lumber Department of Comyn, Mackall & Co., I myself made that offer to Mr. Baxter on behalf of Comyn, Mackall & Co." (Record pages 292-293).

Although Mr. Comyn later on was again called to testify, he gave no further evidence touching upon this offer, and on that subject, at least, he stands discredited.

Plaintiffs surely were not offering $2500 for an extension of the "Marston's" loading date if they did not construe their contract as calling for a cargo to suit the capacity of that vessel. Under plaintiffs' *present* construction of their contract they could, *at any time,* have taken delivery on barges, and need not have placed the "Marston" at the Knappton loading dock at all.

But we have not concluded our reference to the matters of contemporaneous construction on the question of the subject-matter of the contract. A consideration of the conduct of the parties as applied to the schooners "W. H. Talbot" and "Golden Shore", under this identical contract, is enlightening, if not conclusive.

Take first the "Talbot":

The cargo *specifications* for the "Talbot", furnished defendant by plaintiffs, show that they are for exactly 930,000 feet of lumber. The estimate of her capacity

shown by the letter of November 2nd, as well as the later "Acknowledgment of Order", is 1,000,000 feet, while on the "Talbot's" specifications for *930,000 feet,* furnished to the defendant July 23, 1917, there is found this significant direction:

> "This vessel *should carry* about 1,000 M feet, and you are to load last, under no mark, 6x12, 10 to 40 feet, merchantable, *to complete her cargo.*"
>
> (Defendant's Ex. "D"; also Record page 149.)

Could there be stronger contemporaneous construction of the contract, showing that it was a sale of a cargo "to suit the capacity" of the named vessel? The definite number of feet which plaintiffs' claim this to have been a sale of, as affecting the "W. H. Talbot", was 1,000,000. Yet here is evidence uncontrovertible that the 1,000,000 feet 15% more or less, mentioned in the contract, was only an estimate of what the vessel "should carry". The sale was of the amount she *actually* carried, the amount "to suit her capacity", and the direction from plaintiffs was: load the 930,000 feet according to the specification sizes, and then load last, without any mark, sizes, 6" x 12"—10 to 40 feet long, *"to complete her cargo".*

The "Talbot" actually carried, in addition to her 930,000 feet of specification lumber, 41,974 feet of pieces 6 x 12, 10 to 40 feet long, with no mark, for her completed cargo totalled 971,974 feet (Baxter, Record page 248).

This, however, is not all. The other vessel, which, arriving within her loading date, was loaded, was the

"Golden Shore", one of the *"to be named"* vessels of the initiatory letter of November 2nd, 1916. She and the other vessel, subsequently named, were agreed to have a *combined* cargo of 1450 M feet. When the "Golden Shore" was named on February 28, 1917 (Record page 147; Defendant's Ex. "A"), the "Acknowledgment of Order" for that vessel called for a cargo of ½ of 1450 M feet or "725 M feet, 15% more or less". On May 23, 1917, the specifications of the "Golden Shore's" cargo were furnished defendant (Defendant's Ex. "C", Record page 148), and provided for loading first on the vessel a certain lot of specification lumber amounting to *276,002* feet, and for loading last on the vessel a certain other lot of specification lumber amounting to *551,979* feet, making a total of *827,981* feet, and the plaintiffs' instructions for this cargo were that the last lot, of 551,979 feet, was "to be *increased* or *decreased* proportionately to *suit capacity of vessel*" (italics ours).

The contract under which all of these vessels were to be loaded to their capacity was the same. The letter of November 2, 1916, was, in the case of each vessel, followed by an "Acknowledgment of Order", in general terms exactly the same. If one was the sale of a capacity cargo, the same terms and conditions made each and all, *sales of capacity cargoes.* Is it not perfectly clear from the treatment by the parties of the two vessels which made their loading dates, that plaintiffs recognized as to them, that the subject-matter of the contract was a cargo to suit the respective capacities of the respective vessels, and that the definite number

of feet named in the contract, with the clause "15% more or less" was nothing more than an approximation of what that cargo might be?

Supporting this construction is the testimony of the experts, all to the same effect, that in contracts for cargoes for named vessels, the expression of a definite number of feet coupled with the phrase "15% more or less", is nothing more than the estimate of the parties as to what the cargo for the named vessel will be, and is important as giving to the furnishing mill some idea of the amount of lumber that it will be required to cut and have ready when the vessel reaches her loading port.

No other reason for the insertion in such a contract of such a limitation appears in the record, and were it not for this reason, there would be no question but that the insertion of the limitation would be senseless. The very fact of the use of the phrase, "15% more or less", is evidence of the *indefiniteness* of the amount of the sale. Were the sale for a definite amount of lumber there would be no need for the use of this term. Nor is there any need for its use in case it is a sale of a cargo to suit the capacity of a named vessel, except for the reason shown in the record: its assistance to the furnishing mill.

We submit, in conclusion of this subject, that both plaintiffs' and defendant's *contemporaneous construction* of the contract is correct *in law,* as we now hope to show.

Authorities in support of defendant's contention that the subject-matter of the contract was a capacity cargo for "W. H. Marston", and was not, as claimed by plaintiffs, 1,300,000 feet of lumber, fifteen per cent more or less.

Harrison v. Micks, Lamber & Co., 14 Aspinall M. L. C. (N. S.) 76.

In this English case *the sale was of "the remainder of the cargo (more or less about) 5400 quarters Manitoba wheat * * * at Hull ex Clodmore".* The contract was in the ordinary printed form of the Hull Corn Trade Association. Clause 37 provided:

> "The word 'about' when used in reference to quantity shall mean within five per cent over or under the quantity stated."

As it turned out, the "remainder" of the Clodmore's cargo was 5974 quarters, and the controversy turned on the question of whether the buyer was compelled to accept 5974 quarters or only 5400 quarters, with possibly the addition of 5%, or 270 quarters.

The court held that the words "(*more or less about*) *5400 quarters*" were words of *estimate* only and did not mean that the buyers were to be limited to that amount with a possible 5% margin either way; that the sale was of the remainder of the "Clodmore's" *cargo.*

The decision is based on the cases of *Levy v. Berk,* 2 Times Law Reports 898, and *Borrowman v. Drayton,* 35 L. T. Reports 727; 2 Ex. Div. 15; 3 Aspinall M. L. C. (N. S.) 303.

In the former of these cases it was held by Lord Esher, M. R., that where a buyer contracted for a *"cargo"* and mentioned the amount, the governing

word was "cargo" (unless the contrary was clearly shown), and the buyer was bound to take the cargo whatever the quantity.

In the latter case, Mellish, L. J., speaking for the Court of Appeal, held that a contract which called for a cargo of from 2500 to 3000 barrels of petroleum required delivery of the whole cargo of the ship "Lindesmas", consisting of 3300 barrels, unless, under the contract, the buyer was bound to accept a *part* of a cargo. The court said:

> "We think that effect must be given to the term 'cargo' as distinguished from the specified quantity; as, if the parties had intended otherwise, it would have been enough to specify the quantity without introducing the term 'cargo' at all."
>
> *Brawley v. U. S.*, 96 U. S. 168; 24 L. Ed. 622.

The contract in this case called for delivery at a Government post of 880 cords of wood, more or less, as shall be determined to be necessary by the post commander for the regular yearly supply. The post commander informed the furnisher of the wood that but 40 cords would be required under his contract, and in the suit which followed the Supreme Court held that the provision of the contract which called for 880 cords of wood (more or less) was to be regarded merely as an estimate of what should be necessary, to be determined by the post commander. In the course of its decision the court says:

> "Where a contract is made to sell or furnish certain goods identified by reference to independent circumstances, such as an entire lot deposited in a certain warehouse, or all that may be manufac-

tured by the vendor in a certain establishment, or that may be shipped by his agent or correspondent in certain vessels, and the quantity is named with the qualification of 'about' or 'more or less', or words of like import, the contract applies to the specific lot; and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it."

The same court, in speaking of the principle laid down in *Brawley v. United States* (supra), said:

"There is no doubt whatever of the general proposition that where the words 'about' or 'more or less' are used as estimates of an otherwise designated quantity, and the object of the parties is the sale or purchase of a particular lot, as a pile of wood or coal, *or the cargo of a particular ship,* or a certain parcel of land, the words 'more or less' used in connection with the estimated quantity are susceptible of a broad construction, and the contract would be interpreted as applying to the particular lot or parcel, provided it be sufficiently otherwise identified (Pine River Logging & Improvement Co. v. United States, 186 U. S. 289; 46 L. Ed. 1169)."

Pembroke Iron Co. v. Parsons, 5 Gray (71 Mass.) 589:

This was an agreement to sell a cargo of iron to be shipped per barque "Charles William"—about 300 to 350 tons—and it was held to have been complied with by a delivery of 227 tons—as much as that vessel could seaworthily carry. The court says:

"The figures at the bottom, 'about 300 to 350 tons', are undoubtedly part of the contract. But, taken with the context, they manifestly express an

> estimate only, and do not control the descriptive clause designating and limiting the subject of the contract. The defendant, having delivered a full cargo, has performed his contract, and the instructions of the judge were correct."

The principle is approved and applied by the Circuit Court of Appeals for the 6th Circuit, in

Marx v. American Malting Co., 169 Fed. 582, 584;
Inman Bros. v. Dudley & Daniels Lumber Co., 146 Fed. 449, 451.

By the Circuit Court of Appeals for the 8th Circuit, in

St. Louis Paper Box Co. v. Hubinger Bros. Co., 100 Fed. 595, 599.

And also by the Circuit Court of Appeals for the 9th Circuit in the case of

Wolff v. Wells Fargo & Co., 115 Fed. 32, 36.

See also

Rose's Notes on United States Reports, Vol. 10, p. 74.

These cases are unanswerable on the vital question of the subject-matter of the instant contract. They are the cases which were cited by us to Judge Van Fleet on plaintiffs' demurrer and motion to strike, and which may well be assumed to have controlled the court at that time when the former ruling on the demurrer to the complaint was practically reversed, in that it allowed the allegations of the answer touching the question of the presence of the "W. H. Marston",

and kindred allegations, to remain and be proved as matters of defense.

If the court has reached the conclusion that the subject-matter of the contract was a cargo to suit the capacity of the "W. H. Marston", that ends the matter, for it must be conceded as matter of law that the subject-matter of a contract cannot be changed without the consent of both parties. If the subject-matter was a capacity cargo for the "W. H. Marston", it follows that unless that vessel was present at the loading dock *within the agreed loading time,* defendant could not have made a delivery to her of such cargo.

In *Norrington v. Wright,* 115 U. S. 188 (29 Law. ed. 370), the Supreme Court cites with approval Lord Chancellor Cairns' opinion delivered in the case of *Bowes v. Shand* (2 App. Cas. 455, H. of L.), where it is said:

> "It does not appear to me to be a question for your Lordship, or for any court, to consider whether that is a contract which bears upon the face of it some reason, some explanation, why it was made in that form, and why the stipulation is made that the shipment shall be during these particular months. It is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance."

This principle announced by the Lord Chancellor in *Bowes v. Shand* is cited with approval in the recent English case of *Sutro v. Hielbut,* XXIII Com. Cas., Part 1, pp. 21, 28 (C. A. 1917).

In face of the many proofs in the case at bar it seems futile for plaintiffs to attempt the contention that when

the contract was entered into it was *not* the intention and agreement to have the "W. H. Marston" present to take delivery at her tackles. If such *was* the original intent, is it not clear that it was a cargo for that vessel which was to be taken delivery of? If so, then a cargo for the "W. H. Marston" was the subject-matter of the contract, and in that respect certainly the contract cannot be changed so as to make the subject-matter something else, namely, 1300 M feet of lumber, 15% more or less, without the seller's consent.

We now pass to a consideration of the next matter affected by the naming of the "W. H. Marston".

FIFTH CONTENTION.

THE TIME OF DELIVERY.

WE CONTEND THAT THE TIME OF THE CARGO'S DELIVERY IS FIXED BY THE TIME OF THE ACTUAL ARRIVAL OF THE "W. H. MARSTON" AT THE LOADING DOCK AT KNAPPTON, BETWEEN OCTOBER 1 AND DECEMBER 31, 1917. (ASSIGNMENT OF ERRORS NOS. XV AND XIX, 8th AND 12th GROUNDS, AND XXVIII.)

The agreed time for the delivery as well as for the shipment of these four cargoes of lumber was alike for all the vessels, namely: "October/December, 1917", which means at any time between October 1 and December 31, 1917, although Mr. Baxter testified that had the "W. H. Marston" arrived at the loading dock on December 31, 1917, she would have been loaded (Baxter, Record page 230).

It being conceded that the agreed time of delivery in a sale contract of this nature is in the nature of a warranty which cannot be waived or changed by one party without the consent of the other, the question is this: Was the time of delivery in this contract affected by the naming of the "W. H. Marston"? We say "*yes, beyond the shadow of a doubt*". If, as contended by plaintiffs, the naming of the "W. H. Marston" and other vessels was a mere "incident", and they had the right to ignore the vessels and substitute, instead, barges on which to take delivery of these four cargoes, or wagons, or anything else,—then it is manifest that the exact time of delivery, between October 1st and December 31st, could be fixed definitely between such dates, *by the plaintiffs alone,* conditioned only upon their ability to secure and place barges or other receiving mediums at the agreed loading docks. This asserted right of using barges, or something else, instead of the agreed vessels, could be exercised at *any time* within the agreed ninety-day period, and such barges could be secured by plaintiffs without knowledge on the part of the defendant; the result being that plaintiffs would have the power to alone fix upon a definte delivery date despite anything defendant could do to forewarn or apprise itself of such date. Defendant as a consequence would fail, at its peril, to be and remain prepared to make deliveries of the lumber, 60 M feet daily, commencing any time after September 30, 1917, and extending to the end of the ninety-day period. This statement, of course, is subject to the qualification that the specifications would have been furnished the de-

fendant beforehand. That, however, would be a matter also wholly within the plaintiffs' control. The giving of such uncontrolled right to the plaintiffs, by construction, would be unreasonable in a commercial contract of this nature. Furnishing mills could not do business under such conditions, nor was the granting of such an uncontrolled, independent right, ever contemplated by the parties, yet it is just such a one, necessarily accruing to the plaintiffs, under their contention that this was a sale of a definite number of feet of lumber to be taken delivery of on barges or other mediums besides the named vessels, *at their option.*

The testimony, on the contrary, showing the value to the defendant of being able to approximate, independent of the plaintiffs, the time when preparations must commence for supplying the cargo, clearly shows that the reasonable, natural construction points to the conclusion that the naming of the vessel as the receiving medium, *alone fixes,* for both buyer and seller, with reasonable accuracy, the time of the cargo's delivery and shipment. Buyer and seller have by their agreement approximated the date of the vessel's arrival within a period of ninety days, and her actual arrival, within such period, fixes the shipping and delivery date. Therefore, as we construe the agreement, the time of delivery of this cargo is conditioned by the naming of the "W. H. Marston", in that it is such time, within the period between October 1 and December 31, 1917, as such vessel shall have reached her loading dock. This *must* be the reasonable construction of a contract whose subject-matter is a *capacity* cargo, necessarily,

therefore, of an indefinite amount, of a commodity that must be cut and manufactured according to given specifications. Under no other construction could contracts, used in the cargo export trade, providing for long, yet undetermined, delivery and shipping dates, be carried out.

Were the delivery and shipping dates to be fixed by the independent and uncontrolled act of the *buyer,*—the seller would be put to an unreasonable disadvantage which would seriously, if not vitally, affect its power to do business, for when a delivery date is given, extending over a long period of time, the seller necessarily must be placed in a position where it can secure, independent of the buyer, information as to the approximate date it will have to begin to prepare the lumber for delivery. Were the delivery and shipping date to be fixed by the independent and uncontrolled act of the *seller,* the *buyer also* would be put to a similar disadvantage, in making his preparations for *receiving* the lumber.

It must be admitted that the agreed time of delivery and shipment in a contract of this nature, is a condition precedent upon the failure of which the party aggrieved may repudiate the contract. In the case at bar such time is fixed by the actual arrival of the "W. H. Marston" at the Knappton dock between October 1 and December 31, 1917.

Norrington v. Wright, 115 U. S. 188, 222 (29 Law. Ed. 366);

Connell Bros. Co. v. Diedrichsen & Co., 213 Fed. 739;

Gray v. Moore, 37 Fed. 266;

Beck & Pauli Lith. Co. v. Col. M. & E. Co., 52 Fed. 700, 702.

Meier Dental Mfg. Co. v. Smith et al., 237 Fed. 563, 568.

SIXTH CONTENTION.

THE PLACE OF DELIVERY.

WE CONTEND THAT THE NAMING OF THE "W. H. MARSTON", ALSO CONDITIONED THE PLACE OF THE DELIVERY OF THE LUMBER, IN THAT IT WAS SUCH PLACE AT THE KNAPPTON MILL WHARF AT WHICH DEFENDANT COULD EXERCISE ITS OPTION OF MAKING DELIVERY "F. O. B." MILL WHARF KNAPPTON, WITHIN REACH OF VESSEL'S TACKLES AND/OR ON BARGES "A. S. T.", MILL WHARF, KNAPPTON. (ASSIGNMENT OF ERRORS NOS. XV AND XIX, 8th AND 12th GROUNDS, AND XXVIII.)

We next take up the question of whether or no the naming of the "W. H. Marston" conditioned the place of delivery, for if it did, such naming was also in the nature of a warranty not to be waived by either party without the consent of the other.

Plaintiffs' contention, as to the *place* of delivery and shipment, is dependent upon establishing their further contention as to the *subject matter* of the sale, for if the subject matter of the sale is *a cargo* to suit the capacity of the "W. H. Marston", it follows necessarily that the place of delivery must be to that vessel. On the other hand, although it be decided, as contended for by plaintiffs, that the subject matter of the sale was 1300 M feet, 15% more or less, the question of the place of delivery

is still to be determined, for while if the sale is of a *cargo,* delivery *must* be made to the named vessel, still if the sale is of 1300 M feet, 15% more or less, the place of delivery may be either to the ship or something else. Therefore, if the contract is construed as a sale of a cargo to suit the capacity of the "W. H. Marston", that ends the matter. If the construction makes it a sale of 1300 M feet of lumber, 15% more or less, than we still contend that the delivery must be made to and the shipment by the named vessel.

For the convenience of the court we have attached to the end of this argument a diagram that shows roughly the places of delivery contended for by the respective parties, and it is vitally significant, as seen from this diagram, that there is perfect *unity of agreement* as to *one* of such places. Plaintiffs' complaint *alleges* and defendant's answer *admits,* that the provision of the contract reading: *"On barges a.s.t. Mill Wharf"* was *"understood by plaintiffs and defendant to mean"; "On barges at ship's tackles mill wharf"* (Complaint, Record, p. 6; Answer, Id. p. 17).

Plaintiffs have at this late date, however, become conscious of the danger found in this allegation of their complaint, and during the trial an ingenious attempt was made to destroy its effect. The contention being made that this pharse, "on barges a.s.t. Mill Wharf" was, a *"price term",* and it was said that in the cancelled Charles Nelson Contract, "f.a.s. Mill" was also used in connection with the price. Likewise, in the instant contract, on the authority of *Meyer v. Sullivan,*

supra, the phrase "on barges a.s.t. Mill Wharf", has nothing to do with the presence or absence of the named vessel. Let us demonstrate the fallacy of this argument:

Paralleled, the relevant clauses in the two contracts read as follows:

Nelson Contract:

> "Price $10.00 per thousand, base 'G' List less 2½ and 2½ f. a. s. Mill"
> (Plaintiffs' Ex. 2, Record page 71);

Instant Contract:

> "Price: $9.50 Base 'G' List, less 2½% and 2½% for cash"
> (Plaintiffs' Ex. 4, Record page 83).

The instant contract after next covering the subjects of, "Destination", "Grade", "Delivery", "Marking", "Shipment" and "Terms and Conditions"; has this:

> "Notes: This price is for delivery F. O. B. Mill Wharf Knappton, within reach of vessel's tackles and/or on barges A. S. T. Mill Wharf Knappton, Wash." (Id.)

On page 8 of the Record in paragraph X of the complaint, plaintiffs, referring to the substitute purchase for the "W. H. Marston", made from Dant & Russell December 7, 1917, allege:

> "Said purchase price was, at the time of said purchase, a reasonable price for said 'Fir', and was at said time the prevailing market price in San Francisco of 'Fir' *for delivery* f.a.s. or f.o.b. mill wharf *and/or on barges a.s.t. mill wharf.* * * * "

It is thus obvious that plaintiffs in this last allegation intended to state the places of delivery called for by the contract, and as to the particular place, "*on barges*

a.s.t. mill wharf'', plaintiffs allege that this was a place the meaning of which was *''understood by plaintiffs and defendant''* (Record, page 6).

We submit it is now too late to attempt to change this admitted optional mode of delivery reserved to the defendant, into a price term in order to escape the consequences arising from such mode of delivery being conditioned on the presence of the ''W. H. Marston''. This controversy, in a very material part, rests on the settled and admitted plea that one of the agreed and understood modes of delivery was ''on barges at ship's tackles, mill wharf'', and plaintiffs will find it difficult at this time to change this understanding, although the importance of doing so, now lies chiefly in the fact that instead of it giving to *plaintiffs* the right to *receive delivery* on barges (as was erroneously thought when the complaint was drawn), it now must be recognized that it gives to the *defendant* the right to *make* delivery on barges and at the tackles of the ship ''W. H. Marston''.

Nothing is clearer in this controversy than: (1) Defendant is given by the contract the *option* of making delivery ''f.o.b. mill wharf Knappton within reach of of vessel's tackles and/or on barges a.s.t. mill wharf, Knappton, Wash.''; (2) ''This price ($9.50) is for'' such optional delivery; and (3) the pleadings show that both parties ''understood'' that ''on barges a.s.t. mill wharf'' means ''on barges *at ship's tackles,* mill wharf''. In this latter is found the true indicia of a contract,—namely, a meeting of minds, to the end that defendant is given the right of *making a delivery* of a

cargo to the "W. H. Marston" from barges at that ship's tackles at the Knappton mill wharf. How such a delivery could be made unless the ship was at such mill wharf, it is impossible to suggest. If, however, plaintiffs are to succeed in this case, this problem must find a reasonable solution: How can plaintiffs assert a right to *receive* on barges, with the "W. H. Marston" not present, and yet preserve to defendant the right to *make delivery* on barges, at that vessel's tackles, mill wharf?

Defendant has never waived this right, and it was never possible to exercise it, for the sole reason that the "W. H. Marston" was never at the mill wharf.

Referring again to the annexed diagram, it will be seen that the two remaining places of delivery, *contended for by plaintiffs,* are not places called for by *any provision of the contract,* for the reason that neither have any reference to the presence of a vessel. One such place of delivery is simply: "f.a.s. (eliminating from the meaning of these letters all reference to the presence of a vessel) mill wharf.' The only two "f.a.s." provisions of the letter of November 2nd, however, cannot be so interpreted as to eliminate the idea of a vessel's presence. The plaintiff himself makes this perfectly clear when he testifies:

> "You won't find a contract without something following 'f.a.s.' " (Comyn, Record p. 143).

While the two provisions themselves, read as follows:

> (a) "Four cargoes fir f.a.s. Mill Wharves as follows:
>
> 'W. H. Marston', * * * ".

(b) Cargo to be furnished f.a.s. *vessel* at loading ports * * *'' (Record, page 3).

Neither of the letters following that of November 2, 1916 (November 6th, 8th, December 8th), completing the contract, make any reference whatsoever to the phrase ''f.a.s.'' In the provision of the ''Acknowledgment of Order'', dated December 8, 1916, reserving to defendant the right to *make* delivery from either the wharf or from barges, is found the phrases ''f.o.b.'' and ''a.s.t.'', but with the former phrase is connected the expression, ''within reach of vessel's tackles'' and the latter phrase means, ''at ship's tackles'' (Id. 6).

The evidence of all the expert witnesses testifying on the subject is that there is no material difference between ''f.a.s., within reach of ship's tackles'', and ''f.o.b. Mill Wharf, within reach of ship's tackles'', and ''on barges a.s.t. Mill Wharf''.

In all, the idea of the presence of a vessel prevails. How, then, can it be said that the place of delivery, called for by the contract is *alongside* the mill wharf, or on the mill wharf, vessel or no vessel? (See diagram.) Allegations of the complaint also follow this method of ignoring the vessel in stating the meaning of these trade terms, except in the single case of the delivery *on barges,* and plaintiffs' demand in this case was for a delivery on barges *but not at ship's tackles* (a.s.t.) and it was at the ship's tackles that defendant's option to deliver ran.

Construing the plain, unambiguous words of the contract, we believe that the court must find that in deter-

mining the place of the cargo's delivery, the presence of the "W. H. Marston" is indispensable, and that there is no material difference between contracts "f.o.b. within reach of vessel's tackles" and contracts "f.a.s. vessel"—in each there prevails the idea and necessity of a vessel's presence.

Furthermore, if the matters and things touching upon an exporting vessel as the receiving medium for this lumber are to be omitted in the construction of this contract, then neither the letter of November 6, 1916, or the answer of November 8, 1916, need have been written, nor need plaintiffs have found it necessary to offer defendant $2500 for extending the "W. H. Marston's" loading date—there would have been neither loading date or loading place for that vessel.

Furthermore, as has already been suggested, aside from the "specifications", the other documents mentioned in plaintiffs' letter of September 19, 1917, would not have been required, for of what meaning are "bills of lading", signed by the ship's master, "demurrage releases", signed by such master, and "certificates" of a marine surveyor certifying to the proper loading of the ship, or the "stowage plan" of the ship—if the contract is one which is to be construed as permitting plaintiffs, without defendant's consent, to ignore the "W. H. Marston"?

Plaintiffs admitted that it was the original intention to load the lumber on both the "W. H. Marston" and the "W. H. Talbot", *"provided they came along in time"* (Comyn Record, p. 145), and the same witness

admitted that the contract was fulfilled, irrespective of whether there is in it a given number of feet of lumber, "*If it is a contract for a particular vessel,* the contract is fulfilled when the vessel is loaded, if the contract is to suit her capacity, irrespective of whether it is a given number of feet in the contract, if it is a contract for a cargo by the vessel" (Id. 151, 152). In face of the admission that it was the original intention to load the "W. H. Marston", plaintiffs' assertion now of the right to ignore that vessel, needs a more substantial explanation to support it than the vessel's failure to make her agreed loading date.

SEVENTH CONTENTION.

THE QUANTITY OF LUMBER SOLD.

WE CONTEND THAT THE TESTIMONY IS ALL TO THE EFFECT THAT IN CARGO SALES TO SUIT THE CAPACITY OF A NAMED VESSEL, IT IS IMPOSSIBLE TO KNOW THE EXACT AMOUNT OF SUCH SALES UNTIL THE VESSEL IS ACTUALLY LOADED. (ASSIGNMENT OF ERRORS NOS. VIII, XV AND XIX, 1st, 2nd, 3rd AND 4th GROUNDS.)

Here again we contend that the naming of the "W. H. Marston" conditioned the *quantity* of the lumber sold. There is so much already said that is applicable to this subject that we are glad to find it necessary to say but little more.

The evidence is conclusive that if the sale be a cargo for a named vessel, to be furnished in accordance with given specifications, neither the amount of such cargo or its invoice price can be ascertained except by first loading the named vessel.

"It is absolutely impossible to know in advance of the loading of a vessel what her capacity is" (Mansur, Record, page 217).

* * * * * * *

"Q. * * * I ask you why it was that in the specification you named the number of pieces, and in the pro forma bill of lading you left the number of pieces blank? Isn't it because you could not know until the vessel was actually loaded with this specification lumber, how many of the different pieces would have to be inserted in the bill of lading?

A. Exactly, but the mill does not have to do that; our agent can insert that in the bill of lading. We don't have to send that bill of lading to the mill.

Q. And that is the reason, is it not, you could not tell until the vessel is actually loaded how many pieces of specification lumber would appear in the bill of lading?

A. No, not until the vessel is loaded" (Comyn, Record, pages 161, 162).

* * * * * * * * *

"I should say that it would be impossible to determine the exact amount of cargo sold under the contract prior to the actual loading of the vessel" (Griggs, Record page 183).

* * * * * * *

"It is impossible in a contract for cargo sales to suit the capacity of a named vessel to know the amount of lumber sold in advance of actual loading of the vessel" (Id. page 185).

* * * * * * *

"Under such a contract it is not possible to know how much lumber has been sold in advance of the actual loading of the vessel" (Ames, Record page 200). (See also, Baxter, Record page 225.)

* * * * * * *

"In this hypothetical contract which we have been speaking of, although there is a named amount

> of lumber governed by the limitation of 15 per cent or less, you could not exactly tell just what that contract is going to invoice until the lumber is actually put into the vessel in the specification lengths, breadths and sizes'' (Dant, Record page 126).

Mr. Dant was probably plaintiffs' most important witness.

Moreover, the amount of a cargo to suit the capacity of a named vessel is not the same for all loadings. Many matters affect the amount of a ship's *capacity* cargo.

> ''No vessel will carry the same amount of lumber twice in succession. She might carry a dozen cargoes and all vary, due to various conditions. For instance, we have loaded vessels time after time, contract after contract, and when they get down to their loading marks, still the deckload may be 18 inches lower than it was on some other trip on account of weather conditions, water, snow, ice, and there might be a great many things'' (Ames, Record, pages 200, 201).

Mr. Mansur testified:

> ''Some vessels vary in their cargoes. I would say that the size of the lumber has a great deal to do with it, on account of the stowing in the hold, and then the climatic conditions have a whole lot to do, the rain falling, the lumber is soaked with rainwater and it is heavier. If it has snow on it, snow and water, it is heavier, and she don't carry so much. The question of stowage has something to do with the varying of the cargo capacity of a vessel'' (Id. 217).

Mr. Baxter testified:

> ''A ship's capacity does not always remain the same, the loading capacity changes on the same

> ship. A ship changes its loading capacity when it loads the same commodity, such as lumber'' (Id. 225).

Plaintiffs' witness, Mr. Dant, testified:

> ''No matter how well a vessel may be known to you, or how often you have used her, you can only approximate what she will load at a given time, within 5 or 10 per cent, maybe. I have known sailing vessels to carry 40,000 or 50,000 feet more at one time than at another'' (Id. 126).

Mr. Comyn, the plaintiff, testified:

> ''When we put into this contract 1300 M feet, that was what we have approximated to be her carrying capacity. This 15 per cent more or less was a leeway to be used *in the loading of the ship''* (Id. 166).

From the foregoing evidence it is perfectly clear that in order to have ascertained the quantity of lumber sold under this contract the ''W. H. Marston's'' presence was required, and that even then such quantity could not have been determined until the vessel was actually loaded. The record, moreover, abounds with testimony to the effect that a capacity cargo for a named vessel loaded according to specifications, cannot be loaded on barges, unless the actual capacity of the vessel is first known.

We submit in conclusion of this subject that the naming and presence of the ''W. H. Marston'' at the agreed loading place conditioned the quantity of the sale and was, therefore, in the nature of a warranty which one party could not waive without the other's consent.

EIGHTH CONTENTION.

THE BENEFITS ACCRUING TO DEFENDANT THROUGH THE NAMING OF THE "W. H. MARSTON" AS THE RECEIVING MEDIUM FOR THE LUMBER.

In the argument at the trial of this case the statement was made that if a *single* benefit was shown to have accrued to the defendant through the naming and presence of the "W. H. Marston", such benefit could not be denied it without its consent. We wish here to reiterate such contention and submit it to be our considered belief that plaintiffs' case falls because it undoubtedly appears that in more than one particular the agreed presence of the vessel was of benefit to the defendant. These benefits we herewith briefly set forth for the court's assistance.

First Benefit. The naming and presence of the "W. H. Marston" was a guarantee and assurance to defendant that the cargo sold would be exported and the sale, therefore, would be such as was within the power of the defendant to make.

This was an exceedingly valuable benefit to defendant for it is a corporation composed of a combination of interests organized to do an export business only and deriving its powers to do such business, *as a combination,* solely from the act of Congress known as the Webb-Pomerene Bill (Act of April 10, 1918. Comp. St. U. S. Sec. 8836¼, a to e; Fed. Sts. Anno. 1918 Supp., page 246); this act being the culmination of the purpose and desire of the business interests of this country to secure the sanction of law for co-operation in the American export trade. The history of the Webb-Pomerene

Bill shows that it follows the recommendations, submitted to Congress in *May, 1916,* of the Federal Trade Commission after that Commission had investigated conditions that American exporters met in foreign markets. The bill passed the House of Representatives twice, once by a vote of 199 to 35, and again by a vote of 241 to 29, though its final passage by both House and Senate was not until April 10, 1918.

Second Benefit. The naming and presence of the "W. H. Marston" was of benefit to the defendant because it gave to it a means of ascertaining with some measure of accuracy the time between October 1st and December 31, 1917, at which it would be called upon to cut and furnish the specification lumber. The value of this to the defendant is shown by the following testimony given by plaintiff himself:

> "It is certainly an advantage to the loading mill to know with measurable definiteness the time when they would be called upon to cut a cargo of lumber. The naming of an exporting vessel gives to the loading mill some measure of information on that subject. They can see where she is and follow her movements. They can get information from the "Guide" or some such paper or from the buyer. We have sold f.a.s. cargoes as a manufacturer. We have found that when we extend our delivery dates over a period of, say, 90 days, it is helpful to us, as a manufacturer, to know by examining the "Guide" and such papers when the carrying vessel will probably require the lumber, because you will then be guided as to when you shall begin to cut your lumber. It is a matter that the mill likes to know. They might slip in another cargo in the meantime. We have done that before. When we found a vessel was going to be late, we have taken

one out of order and put it in. It enables your mill to keep circulating right'' (Comyn, Record, pages 153-154).

Plaintiffs' witness, Mr. Dant, confirms this:

''The object of providing that long delivery date is the estimated time that the vessel will arrive at the loading port.

Mr. McClanahan. Q. This order, then with the long delivery date, the named carrying vessel, and the amount of lumber purchased, is sent to the mill; is there any benefit that the mill derives in such an order through the naming of the vessel?

A. They can look the vessel up if they choose to keep track of the vessel.

Witness (continuing). They can find out when they will be called upon approximately to furnish the lumber. When they want that information they look up the position of the vessel, and they do that by an examination of the shipping papers, what we call the 'Guide'. The 'Guide' is a recognized shipping journal which keeps track of the movements of sailing vessels. When the mill has this order presented to it, that they are apt to be called upon in 90 days for the delivery of a certain amount of lumber to a particular named vessel, they can look up in the 'Guide' and find out approximately where that vessel is and then approximate when she will be due at the loading port. That is of value to the mill, in that it gives the mill some idea as to when it shall commence to cut and have the lumber ready'' (Record, pages 122, 123).

The value of this ability to forecast the time when it would be called upon to commence preparations for the delivery of the cargo is illustrated in the case at bar. On September 20, 1917, having been furnished with the specifications, defendant deferred commencing the lumber's preparation with safety, until there came a time

when the possibility of the vessel reaching the loading port had vanished. Defendant, therefore, was saved the necessity of having to meet the embarrassing situation that would have arisen had it proceeded cutting the cargo and then at the end found that the vessel would not reach her loading dock in time to take delivery of it in accordance with the contract.

> "We did not commence to cut this lumber in accordance with the specifications on the 1st of October, because the position of the vessel was such that we did not think she would make her loading date" (Baxter, Record, page 227).

Third Benefit. The naming and presence of the "W. H. Marston" was of benefit to the defendant because it gave it some idea, derived from the record of the vessel's previous loadings, of how much lumber the mill would have to cut. If the sale, at the buyer's option, was of 1,300,000 feet, 15% more or less, as contended for by plaintiffs, it would not have been known within a limit of 30% what the plaintiffs would demand.

Fourth Benefit. The naming and presence of the "W. H. Marston" was of benefit to defendant because it was in a measure an assurance against speculation on the part of the plaintiffs.

If the sale, at the option of the plaintiffs, was of 1,300,000 feet, 15% more or less, without reference to its being a cargo for a named vessel, there would be a 30% margin for speculation. As, for instance, if the market rose, the buyer would demand the 15% more, if it fell he would demand the 15% less. The provision of the contract "15% more or less", if it did not give the

buyer this right of speculation, would mean nothing, and the contract would more properly be for the sale of 1,300,000 feet and nothing else. On the other hand, the seller would have no such option. With the naming of a vessel and the sale of a capacity cargo for that vessel, both parties would be on an equal footing as to the amount of the sale, and there would be no room for speculation on the part of either buyer or seller.

The plaintiff, Mr. Comyn, on the theory that this is a sale of 1,300,000 feet, 15% more or less, recognizes the speculative advantage he would derive from such a purchase. In speaking of the reason the phrase "15% more or less" is used, he says:

> "That is one of the ways we sometimes make more money. It gives you a speculative contract with a leeway of 30 per cent" (Comyn, Record, page 151).

Although plaintiffs are asking for a judgment based on a sale of 1,300,000 feet, nevertheless the court is not so much interested in the amount the plaintiffs are *willing* to call the sale, as it is in the amount the contract *permits* it to be called. The limitation of 15% more or less, if it is not a part of the contract to be used for the purpose of an estimate of the approximate amount the mill will be called upon to furnish, as a capacity cargo for the named vessel, then it can be nothing else than a margin within which the buyer may speculate. It cannot be ignored. If it is not construed to be an estimate, then it must be held to be a speculative margin, and the amount of the sale will therefore depend upon the rise and fall of the market.

We predict that the court will hesitate before giving judgment on any such construction, which we believe clearly would make the contract illegal and unenforceable.

Fifth Benefit. The naming of the "W. H. Marston" was of benefit to the defendant because, as is shown by the "f.o.b." cases herein cited, a stipulation respecting the *place or mode* of delivery in sales contracts of the nature of the one at bar is always construed as for the benefit of both parties. Here the *place* of delivery was the vessel at mill wharf, and the *mode* of delivery was from such mill wharf and/or on barges there, at the ship's tackles, at the seller's option.

NINTH CONTENTION.

WE CONTEND LASTLY THAT IT WAS ERROR FOR THE TRIAL COURT TO REFUSE TO DEDUCT 15% FROM THE FINAL JUDGMENT OF $17,592.72, THEREBY MAKING SUCH JUDGMENT THE MINIMUM IN AMOUNT. (ASSIGNMENT OF ERRORS NO. IX.)

On plaintiffs' contention that the subject matter of the contract was "1,300,000 feet, 15% more or less"; the court's final judgment is based upon the exclusion of all related words and phrases, and stands as a judgment for failure to deliver *exactly* 1,300,000 feet of lumber. Not only does the court's judgment exclude consideration of the related words of the contract, "15% more or less to suit capacity of vessel", but it also excludes consideration of the phrase, "15% more or less", which is so closely related to plaintiffs' *contention* as to what the subject matter of the sale is.

It will first be noted that in plaintiffs' letter of October 10, 1917 (plaintiffs' Exhibit No. 12, Record, page 97), they squarely intimate that if their contention as to the subject matter is correct; it allows defendant the privilege of taking advantage of the limitation phrase and making delivery of 1,300,000, *less 15%*. The same construction was followed after suit was brought, for counsel will not deny that this was their view in the printed brief on plaintiffs' demurrer to defendant's answer: *"It was obligated to deliver at least 15% less than 1,300,000 feet, in any and every event"* (page 17), is but one of several statements of like import in said brief.

It is perfectly obvious that in reaching the exact amount of the money judgment in this case, the court's construction of the subject matter of the sale led it to ignore entirely the words of the agreement, "15% more or less to suit capacity of vessel". We contend, however, that this was manifest error, for although the subject matter of the sale, *in the absence of the schooner "W. M. Marston"*, is held to be 1,300,000 feet of lumber, nevertheless, when it comes to pronouncing a money judgment against defendant for breach of its contract, the limitation of 15% should have been recognized, for the reason that the schooner's *absence,* which alone made possible the findings as to the subject matter, was the result of the act of plaintiffs alone, and incidentally they profited by it to the extent of $5,000.00. It would seem but common justice to deny the plaintiffs the right to ignore the 15% limitation, in view of the circum-

stances under which the "W. H. Marston" was delayed and the plaintiffs were profited.

We have cited in this brief a number of cases bearing on the subject matter of the instant contract and we have done so in the belief that they will be of assistance to the court in finding that a cargo for the "W. H. Marston" was the subject matter of the contract and not 1,300,000 feet of lumber. Such a finding ends the case. If, however, this court shall approve of the lower court's finding as to the subject matter of the sale; these cases which we have cited will not be relevant to the subject of the proper amount of the money judgment to be given herein. A very recent English case, which is squarely in point, is published in the December, 1920, issue of The Times Reports of Commercial Cases and will be reported as *Thornett and Fehr v. Yuills,* 26 Com. Cas. 59.

The material part of the contract in that case is stated as follows:

> "1. By a written contract dated April 16, 1919, Thornett and Fehr, of London, the buyers, contracted to purchase from Yuills, Limited, of London, the sellers, 200 tons, five per cent more or less, of Australian double triangle T or double triangle B beef tallow, fair average quality of the brands 1919 make, at 72/- per cwt., ex ship, landing weights, shipping tares: cost freight and insurance paid to the United Kingdom".

For reasons held immaterial the sellers failed to deliver all the cargo and one of the questions in the case was whether they were at liberty to supply only 190

of the 200 tons under the "five per cent more or less" clause.

The parties went to arbitration and, on the point in question, the arbitrators held as follows:

> "9. We are of opinion that the phrase '5 per cent. more or less' operates merely to cover accidental or inadvertent variations from the quantity stated in the contract and does not entitle a seller to deliberately supply either more or less than the contract quantity".

On appeal counsel for the buyers stated that "As to the 5 per cent clause, the effect of such a clause has never been decided. There is no evidence of any customary meaning of the words, but the natural meaning to be given to them is that which the arbitrators have given".

The Earl of Reading, the Lord Chief Justice of Great Britain, delivered the opinion of the court and, on the point now in question, said:

> "The remaining question is, what is the effect of the clause as to delivery of 200 tons, 'five per cent more or less'. The meaning of that clause is that the sellers are bound to deliver at least 190 tons, and may if they please deliver any further amount to make the total as much as 210 tons. The sellers have the right to decide how much they will deliver within the given margin, and I do not agree with the arbitrators in thinking that the words 'five per cent more or less' only cover accidental or inadvertent variations from the contract quantity. All that the sellers here are bound to deliver is 190 tons, and the court cannot inquire whether the shortage is accidental or deliberate. If at least 190 tons had been delivered the contract would have been performed, and the damages here can only be

damages for non-delivery of the 29 tons outstanding beyond the 161 tons which the sellers are ready and willing to supply."

The only possible distinction between this case and the one at bar lies in the super added words in the case at bar: "to suit capacity of vessel." But surely, if plaintiffs, who had the sole power of producing the vessel, did not produce her, they cannot claim an advantage on that account. The vessel not being there, the words in question must, on the construction adopted by the trial court, be treated as non existent.

See also:

W. R. Grace & Co. v. Jules Maes & Co., 183 N. Y. Sup. 105;

Levin & Co. v. North Adams Mfg. Co., 178 N. Y. Sup. 607;

Washington Lumber Co. v. Midland Lumber Co., 194 Pac. 777;

Consol. Water Co. v. Louisville Herald, 211 Ills. App. 569; Ills. Notes, Digest, Vols. XI to XV, and Cumulative Quarterly.

We submit in conclusion of this subject that, if the trial court's judgment is to be sustained, it should first be reduced by $2,626.65, this being 15% less than the judgment as it now stands.

CONCLUSION.

In conclusion of the entire brief we submit that both the law and the facts governing this case call for the re-

versal of the judgment rendered herein and that it be held further that defendant is entitled to judgment for its costs in both courts.

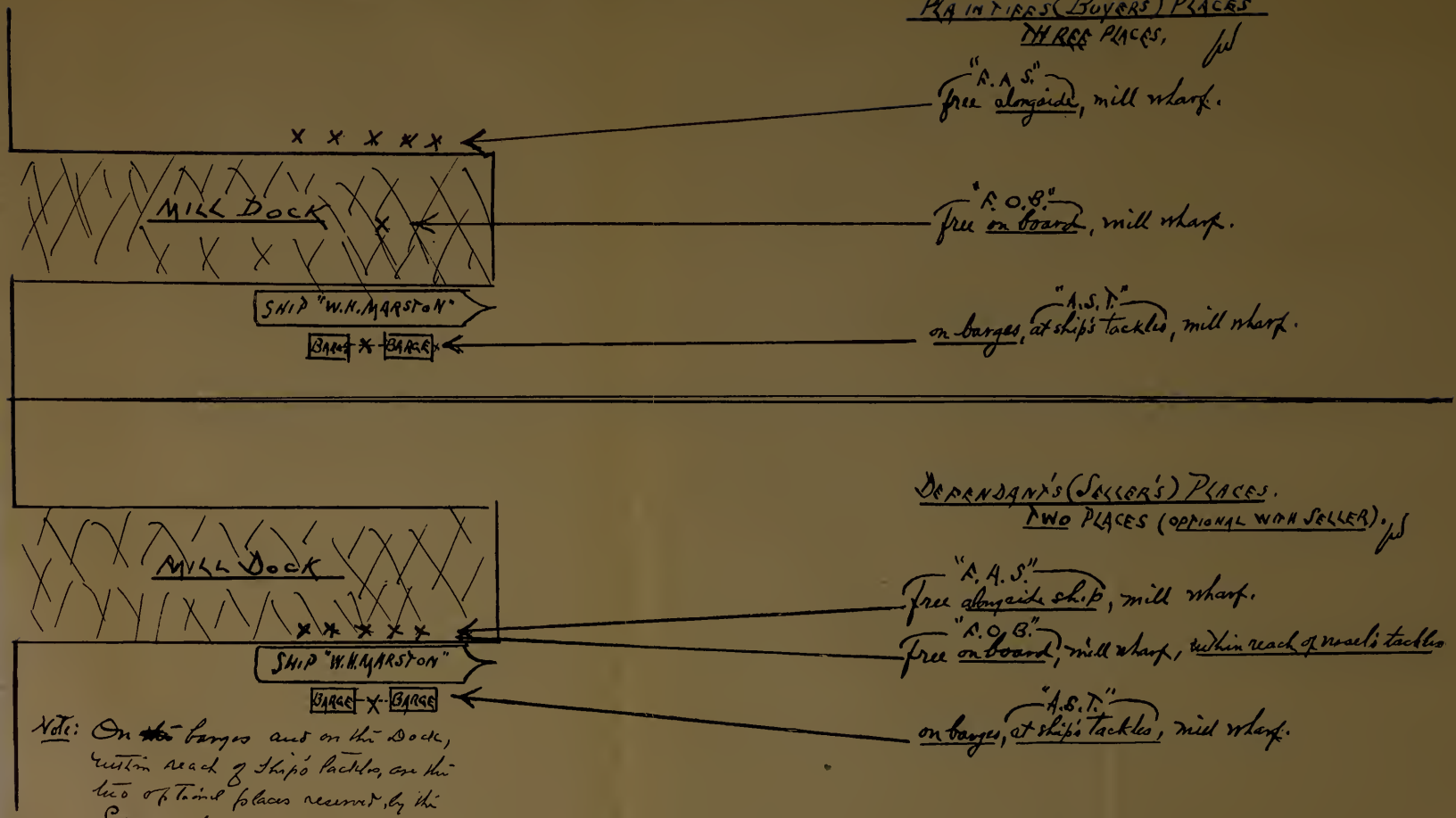
Dated, San Francisco,
October 8, 1921.

Respectfully submitted,

CHICKERING & GREGORY,
McCLANAHAN & DERBY,
Attorneys for Plaintiff in Error.

DIAGRAM.

PLACES of DELIVERY of CARGO
AS CONTENDED FOR BY RESPECTIVE PARTIES.



Note: On the barges and on the Dock, within reach of Ship's tackles, are the two of the three places reserved by the Seller in the "Acknowledgment of Order" of Dec. 8th.